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# Civil Cases and Society: Process and Order in the Civil Justice System

David M. Engel and Eric H. Steele

*It is not an exaggeration to say that we live in an era preoccupied with the problems and challenges of obtaining justice in civil cases. Concerns expressed about the civil justice system range from warnings that civil court dockets are clogged by disputants too litigious for their own good to complaints that the legal system is used too rarely in civil cases.*

*The authors approach their analysis with a sense that this subject area is in need of more and better theory. It is an unfortunate fact that discussions of civil justice—and suggestions for reform—have been marked by contradiction and confusion and have been engrossed with small matters that tend to obscure from view the system as a whole.*

*The first part of this essay focuses on what the civil justice system is and does. It presents a five-stage model of civil case processing and examines relationships between this model and the criminal justice system. The second part of the essay considers this model in a broader context. Here the authors examine two paradigms of civil case processing and their implications for the implementation of legal norms and the pursuit of justice in society.*

## INTRODUCTION

This essay is about the quest for justice in civil cases. Doubts concerning the adequacy of the legal system in handling civil matters arise, perhaps inevitably, from the very attempt to make our ideals of law and justice a reality. From time to time, however, such doubts attain a

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heightened sense of urgency or even crisis and generate a widespread re-examination of our laws and legal institutions. Now is such a time.

The current debate has been marked by the absence of a commonly accepted conceptual framework for understanding and discussing the civil justice system.<sup>1</sup> Without a clear view of the civil system as a whole, there has been a failure to grasp the interconnectedness of its problems and shortcomings and to perceive the long-term implications of proposed solutions. More particularly, four related (and, we believe, erroneous) assumptions about the civil system have prevailed. First, it is typically assumed that the civil justice system is not in fact a system,<sup>2</sup> that it lacks any clearly discernible integrating structure or order, that the processing of civil cases is essentially decentralized, atomistic, and heterogeneous. Second, it is assumed that the civil system differs significantly from the criminal system in this respect and that the two systems are fundamentally dissimilar in structure and function. Third, it is assumed that the civil and criminal systems are relatively independent of one another and that any interaction between the two systems is relatively unimportant for understanding either of them. Fourth, as a consequence of the first three assumptions, it is assumed that the civil system can be reformed and improved by particularistic and narrowly conceived measures without considering the impact such measures might have on the legal system as a whole and on the various linkages and interactions within the system. In this essay, we seek to show that each of these assumptions is incorrect. By emphasizing the regularities of civil case processing and the similarities that link the civil and criminal sys-

1. We should make clear at the outset that our references to "civil justice" or the "civil justice system" are not to be confused with the civil law systems found in Western Europe, Latin America, and elsewhere. Our terminology is meant only to distinguish civil cases and institutions from those associated with the criminal law in the Anglo-American legal tradition.

2. The term "system" (as in "civil system" and the "criminal system") appears frequently in the traditional legal literature and has, through long usage, acquired a commonly understood meaning. When we use the term in this essay, we intend that it carry this traditional meaning. In our analysis of civil case processing, we have also been cognizant of a more specialized theory of "systems" developed relatively recently in the social and natural sciences. Systems theory has had a far-reaching and pervasive influence not confined to any particular scientific discipline. In our discussion, the influence of general concepts and insights provided by systems theory should be apparent. In particular, we have drawn on the concept of a *system* as (a) composed of parts inter-related in particular ways, (b) characterized by specific patterns of mutual interaction among such parts, and (c) continually changing internally in reaction to external forces and moving toward new forms of equilibrium while retaining consistent and recognizable structural features.

While these general concepts have been useful in formulating and communicating our model of the civil justice system, we do not attempt to deal with the technical complexities of systems theory nor do we incorporate by reference any of the sometimes conflicting schools and interpretations it has spawned. Further, we view the civil justice system as a dynamic and flexible structure fully capable of being changed and improved, whether through internal processes or through carefully considered external initiatives, a view not shared by some interpretations of systems theory.

tems, we argue for a more far-reaching and fundamental reconsideration of process and order within the civil justice system.

The two major sections of this essay reflect an underlying duality of purpose. In the first section we present a model of the civil justice system. This model is conceived as a sequence of stages that mark the potential movement of legal matters in society through various processing alternatives, including (and with particular attention given to) civil trial courts. In our presentation of this model we emphasize the regularities and common features typifying cases that enter and are processed within the civil system. Further, we emphasize the interactions and feedback patterns among the various stages of our model and between our model of the civil system and the criminal system.

In the second section of the essay we consider this model of the civil system in its broader societal context. That is, we explore some of the ways in which civil case processing alternatives might achieve or contribute to the achievement of traditional notions of social justice. In our analysis, we set forth and discuss two idealized concepts of the manner in which civil legal processes are implicated in social and cultural processes generally. The first of these two paradigms views civil cases in a particularistic and mechanistic way. The ideal function of the civil system, according to this view, is the disposition of numerous and varied cases to regulate social conflict as widely and as frequently as possible. The second paradigm focuses less on case-by-case processing and more on the holistic processes through which the legal system—and especially the courts—acts in an illustrative and exemplary manner to order the social system. Thus the civil system model presented in the first section of this essay is, in the second section, re-examined in light of these two different conceptions of law and justice in society. The re-examination also analyzes several kinds of proposed civil system reforms and suggests how such reforms might affect the legal system as a whole.

Our purpose then, is to focus more sharply on what the civil justice system is and does and to consider the implications of this case-processing system for achieving broader goals of justice in society. We approach this analysis of the civil justice system with a compelling sense that the subject area as a whole is in need of more and better theory. Although studies of civil case processing have proliferated in recent years, the lack of strong theoretical orientations has made such studies appear diffuse and unconnected. They have probed the entire civil area here and there but have not yet provided a sense of the system as a whole. More has been learned about particular substantive and pro-

cedural areas, but these subjects have generally been considered in isolation.<sup>3</sup> The interrelationships among them have not been emphasized, and their place in the civil justice system has too often been ignored. There has been a general reluctance to view the civil system *as a system*, to attempt to integrate its myriad components into a broader perspective that would make apparent the features shared by all civil legal matters and processes—whether or not they become court cases—from their beginnings to their ends.<sup>4</sup> There has been a conspicuous failure to examine the civil system in its broader social context and to explore the implications of civil case processing for issues of social organization and control generally. The lack of theory has, we believe, deprived us of the analytic framework necessary to understand the subject area and has made it difficult to assess the real need for change as well as the likely results such change might bring.

From the late nineteenth century to the present a variety of concerns have been expressed about the functioning of the civil justice system, ranging from warnings that our civil court dockets are overwhelmed with lawsuits to complaints that individuals are unfairly denied reasonable access to our civil courts, from fears that Americans have become too litigious for their own good to suggestions that they have become too prone to absorb legal injuries without seeking redress. In response to such concerns, numerous reforms have been advocated, and some implemented, varying in nature from small and concise rule changes to major restructuring and large infusions of money and manpower.<sup>5</sup> Some groups have proposed vast expansions of jurisdiction, caseload, and clientele and even the creation of entirely new systems of private or public agencies.<sup>6</sup> Others have advocated drastic contractions of governmental processes and resource com-

3. There have been legal and sociolegal studies of parts of the civil justice system, including such substantive areas as divorce, personal injuries, consumer problems, mental health, debtor-creditor relations, and the like. Studies of procedural matters have been concerned with such subjects as jury trials, small claims courts, court delay and backlog problems, the creation and implementation of procedural codes, the revision of evidentiary rules, and nonjudicial dispute-handling processes. The commonalities and cross-relationships among these various topics within the civil system, however, are not often considered in any depth.

4. For a discussion of the problematic nature of the term "case" in this context, see pp. 304-5 *infra*. As to our concept of a "system," see note 2 *supra*.

5. In the late nineteenth and early twentieth centuries, the influence of the beginnings of sociological jurisprudence and "legal realism" contributed to a widespread re-examination of, and interest in, trial court processes. Many reform proposals, such as the creation of small claims courts and juvenile courts, date from this period.

6. For example, activist groups from the early progressives to civil rights, environmental, and consumer advocate groups have favored expanded concepts of jurisdiction and standing, the implementation of class action procedures, the creation of new regulatory agencies such as the Consumer Protection Agency, the Environmental Protection Agency, and the Equal Employment Opportunity Commission, and the institution of new investigatory resources and remedies at all levels of government.

mitments and the narrowing of jurisdictions and clientele.<sup>7</sup> Proposals range from elaboration to simplification of procedures,<sup>8</sup> from efforts to assure everyone a lawyer to structural reforms to make pro se litigation the practice and thus make lawyers unnecessary.<sup>9</sup> What characterizes these diverse and often conflicting proposals is a profound lack of systemic consideration. Each reform is an ad hoc suggestion designed to remedy a specific perceived problem in the administration of civil cases. Few of the reform proposals consider either the perceived problem and its cause or the proposed solution and its impact from the perspective of the entire system of civil justice as it functions in society. Perhaps more important, the failure to consider the civil justice system as a whole obscures from view the models or policy alternatives of what a reformed civil justice system might look like, and only such general models can provide the criteria on which to base evaluation of the present system and to judge proposed reforms. It is time, then, to step back and attempt a broader view.

## I. A MODEL OF THE CIVIL JUSTICE SYSTEM

We shall begin by introducing our model of the civil system reduced to its barest essentials and removed from any broader legal or social context. We should emphasize at the outset, for those who are more accustomed to viewing civil litigation by means of appellate court decisions in leading cases, that we are, in a sense, taking a "worm's eye" view of the civil justice system or, to use a different metaphor, a view

7. There has been a clearly discernible counterreaction to the expansion of judicial intervention, especially in such areas as civil rights, labor relations, environmental and consumer matters, product liability, and professional malpractice. Individuals and groups have advocated a variety of measures to cut down on suits of these kinds. Such measures include revision of jurisdictional standards; rule changes to make such litigation more expensive or less convenient; narrowing the definition of class; the reduction of government subsidies of legal fees; and the amendment of regulations that are believed to generate unnecessary litigation in such areas as equal employment, affirmative action, occupational safety and health, and environmental protection.

8. Although reforms are seldom advertised as "elaborations" of existing practice, the following have had that effect in whole or in part: the enactment of measures providing for extensive discovery and pretrial conference procedures; the interposition of administrative remedies that must be "exhausted" before litigation is permitted; and various due process requirements to assure consistency and fairness in such matters as service of process, garnishments and wage assignments, repossessions, foreclosures, and evictions. Reforms that have tended to "simplify" existing procedures include the creation of specialized forums with simplified processes (e.g., small claims courts) and the simplification of various substantive areas of law (such as no-fault divorce or new probate laws modeled after the Uniform Probate Act). Some reforms are anomalous in this regard, such as the movement that led ultimately to enactment of the *Federal Rules of Civil Procedure* and its state equivalents. While simplifying and streamlining civil pleading and litigation in some respects, the codes have tended to elaborate pretrial activities and introduce new complexities into the earlier phases of judicial processing.

9. Efforts to assure everyone a lawyer, for example, include legal aid services, group legal service plans, legal insurance, and general liability insurance. Efforts to make lawyers unnecessary include the establishment of pro se courts, where lawyers are discouraged or barred, and the creation of diversion systems to handle civil cases through mediation, counseling, arbitration, and other simplified or nonadversarial processes.

from the production line rather than the executive offices.<sup>10</sup> We begin with the ordinary, everyday civil matters that arise in our society, some of which eventually find their way to court but most of which are ignored, abandoned, or handled in some other way. Such matters may involve divorces, evictions, bill collections, and so forth—a far cry from the glamorous, complex, expensive, and intellectually challenging cases that usually capture the attention of lawyers, judges, and legal scholars. Nevertheless, these mundane but numerous civil matters are grist for the mill of civil justice, and studying them is a necessary complement to legislative and appellate orientations. By focusing initially upon such matters, we will gain a better sense of the civil system as a whole and the place of the more glamorous landmark cases in that system. What follows, then, is a preliminary attempt to describe and chart the civil justice system in its totality and to suggest some of the ways in which that system forms a major part of the network of law, legal behavior, and legal institutions in our society.

The “life” of a legal case can be conceived in terms of five stages: (1) the primary event, (2) the response decision, (3) pre-judicial processing, (4) judicial processing, and (5) implementation and consequences. Not all cases, of course, pass through each of these stages. Rather, this scheme may be envisioned as a pyramid, with the first stage, the base, containing all the events and cases that might potentially enter later stages of the system, and the fifth stage, the tip, containing relatively few. Each stage except the first thus concerns itself with a reduced portion of cases passed on from a preceding stage. For various reasons, some known and some not, it is characteristic of the entire system that legal events and cases tend to drop out along the way, to be processed in other less formal ways, and to resist the temporal sequence toward trial and judgment that is itself the popular symbol of our legal system. This appears to be equally true in the civil and criminal areas.

Let us put this proposition the other way around. Suppose it were possible to select from the docket of a local trial court any lawsuit that had been formally adjudicated as a civil case and, through some extraordinary exercise of cinematic ingenuity, to film the life history of that case as it passed through each of the five stages. Suppose, further, that we were to run the resulting film backward, beginning with stages 5 and 4 and continuing back in time toward the actual inception of this civil

10. In some senses our perspective resembles that of the group Jerome Frank termed “fact skeptics”—those who advocated a realistic and empirically based view of the ways in which trial courts actually process civil cases. Whereas that group emphasized judicial processes and the effort to make trials themselves more accurate and just, our emphasis is on viewing the realities of civil litigation in terms of the broader legal and social contexts in which civil cases arise and are handled in a variety of ways—nonjudicial as well as judicial and postjudicial. See Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 73-74 (New York: Atheneum, 1963).

case as a "primary event." The further back we went, the more we would find the screen crowded by apparently similar matters, only one of which, the subject of our film, was destined to become a lawsuit. It would be difficult and perhaps impossible to differentiate the nascent civil case from the scores of similar disputes, relationships, situations, or events that appeared on the screen. Yet we know that the vast majority of such matters eventually result in nonlitigated outcomes, ultimately to be ignored, abandoned, negotiated, mediated, "counseled," or processed through a broad array of administrative channels.

In this paper we focus on those matters that ultimately move to litigation and on some of the forces that appear to propel them toward their rather special fate. Yet we are acutely aware of—and shall also consider—the broad similarities among all civil matters within any of the five stages, whether or not they become "civil cases" in the more formal sense of the term.<sup>11</sup> Indeed, viewing the life history of a lawsuit in this retrogressive fashion underscores the fact that the term "civil case" itself is a problematic one. Particularly in the first two stages we are struck by the fact that civil matters undergo a high degree of reconceptualization, aggregation, separation, and regrouping. One event may give rise to several cases or act as the proximate cause triggering action on other unrelated matters. Conversely, several primary events, or parts of several, may be aggregated into a single case. Thus, there is no clear correspondence between "events" and "cases" throughout the scheme as a whole or, for that matter, between a particular case in an early stage of processing and its manifestation or manifestations in later stages. Our subject, the "civil case," emerges as a sharply defined entity only in the final stages of its life cycle.

We shall first describe briefly each of the five stages that compose our model. Here we shall emphasize the distinctive functions or processes of each of the five stages. Later we shall flesh out this rather isolated and simplified view of the civil system by drawing attention to some of the many strands that connect it to other forms of case processing—in particular the criminal—and to its broader social and cultural environment.

11. We are also aware that litigation itself is no longer a *sui generis* procedure and is therefore a somewhat arbitrary criterion for us to use in selecting one group of civil matters for special consideration. The development and expansion of quasi-judicial administrative proceedings in recent years has blurred the distinction between judicial and nonjudicial case processing and has, in effect, created a third—administrative—realm of law in addition to the civil and the criminal. To the extent that such proceedings have become so formalized that they resemble the more traditional processes of our trial courts, they may, for purposes of analysis, fall within our fourth stage—judicial processing. To the extent that they remain less formal and tend themselves to lead to litigation, they may fall within our second and third stages. Although we do not consider such processes at length in this paper, we allude to them at various points and view them as compatible with and, in some senses, illustrative of the five-stage model we present.



## A. The Stages of Civil Case Processing

### 1. *The Primary Event*

The civil system draws its cases from a vast pool of incidents, relationships, and interactions in society, any of which could serve as the basis for subsequent legal action. For lack of a better term, we shall designate such incidents, relationships, and interactions as "events," with the explicit understanding that this term includes a great many inchoate matters as well as the more traditionally conceived "cases and controversies" from which lawsuits are typically thought to derive. We must emphasize, furthermore, that the distinction between "events" in society generally and events that are properly "legal" in character (and potentially actionable) is extremely difficult to define precisely. In part, this distinction is dependent on highly variable and elusive cultural factors that determine how and when the formal law is drawn into our day-to-day lives. In part, too, the legal-nonlegal distinction is a product of social and psychological factors that influence individuals and groups to mobilize or not to mobilize the law under different circumstances.<sup>12</sup> We shall discuss these considerations more extensively in our treatment of the second stage (response decision) and in section B, where we explore the multiple interactions of the civil and criminal systems in each of their stages. For purposes of discussion at this point, however, let us suggest only that before contact with the formal legal system occurs and before persons affected by such matters perceive of themselves as potential litigants, there is the primary event itself—the first stage in the life history of a case.

Our understanding and perception of this large and rather amorphous pool of events from the civil perspective has differed from that of the criminal perspective, and the differences are revealing. On the criminal side we have learned from victimization surveys and other attempts to tabulate the occurrence of criminal causes of action in society

12. The distinction between "events" and "legal events" may be clarified by a brief reference to labeling theory, which deals with the processes by which particular forms of conduct come to be viewed as socially proscribed or deviant. The perception and characterization of certain events as "legal" depends in large measure on processes similar to those that lead to the labeling of certain behavior as deviant. Kai T. Erikson provides a succinct summary of labeling theory:

Deviance is not a property *inherent* in any particular kind of behavior; it is a property *conferred upon* that behavior by the people who come into direct or indirect contact with it. The only way an observer can tell whether or not a given style of behavior is deviant, then, is to learn something about the standards of the audience which responds to it.

Wayward Puritans: A Study in the Sociology of Deviance 6 (New York: John Wiley & Sons, 1966). Similarly, if we want to know whether a particular primary event may be characterized as "legal" (assuming it meets some minimum standard of technical actionability), we must consider social and cultural factors that shape the process of definition. See also Kai T. Erikson, Notes on the Sociology of Deviance, 9 Soc. Prob. 307-14 (1962); Howard S. Becker, Outsiders: Studies in the Sociology of Deviance (New York: Free Press of Glencoe, 1963); John I. Kitsuse, Societal Reaction to Deviant Behavior: Problems of Theory and Method, in Howard S. Becker, ed., The Other Side—Perspectives on Deviance 87-102 (New York: Free Press, 1964).

that many events one might consider "crimes" never in fact become criminal cases, may never be reported to the police, and, indeed, may not even be perceived by the respondents as actionable. Nonetheless, concern for public safety has prompted criminologists and law enforcement officials to keep a close watch on such events and has stimulated widespread discussion and debate over the social, environmental, psychological, and even physiological factors that might cause them to occur.

On the civil side there exists a clear analogue to the concept of the criminal legal event, but we have seldom explored this stage in quite the same way from a civil perspective. Unlike the criminal area, there has been little concern with questions of etiology in civil cases, except in particular specialized fields, nor has there been much interest in examining and perhaps modifying the social or environmental conditions giving rise to events that could eventually enter the civil system.<sup>13</sup> Rather, inquiries have been confined largely to questions of problem frequencies in the population and the nature of individual responses to such problems. Instead of attempting to ascertain why and how such events occur in society, attention has been devoted primarily to the use of legal and nonlegal resources to deal with them.

Two prominent lines of research may serve to illustrate the leading approaches taken toward this stage of the civil justice system. One research tradition, with roots in an early concern that poor people's legal needs are not adequately met, has undertaken to survey portions of the general population to inquire about the frequency with which various legal problems arise.<sup>14</sup> Such problems, primarily civil in character, are classified under such formal legal headings as torts, landlord-tenant problems, employment discrimination, real estate and commercial transactions of various kinds, divorces, wills and trusts, and the like. In keeping with the concern that originally prompted this research, the inquiries about problem incidence are usually coupled with questions about the use and nonuse of lawyers and other legal resources to resolve the problems. A second and closely related research tradition has grown out of the consumer movement and reflects a concern that

13. Although the etiology of civil cases *generally* has not been explored, this issue has been addressed in certain subfields, such as that of automobile accidents (see, e.g., H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* (Chicago: Aldine Publishing Co., 1970)) and family cases (see, e.g., Max Rheinstein, *Marriage Stability, Divorce, and the Law* (Chicago: University of Chicago Press, 1972)).

14. E.g., Felice J. Levine & Elizabeth Preston, *Community Resource Orientation Among Low Income Groups*, 1970 *Wis. L. Rev.* 80; Leon Mayhew & Albert J. Reiss, Jr., *The Social Organization of Legal Contacts*, 34 *Am. Soc. Rev.* 309 (1969); Leon H. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 *L. & Soc'y Rev.* 401 (1975); and Barbara A. Curran's nationwide study, *The Legal Needs of the Public: The Final Report of a National Survey* (Chicago: American Bar Foundation, 1977).

the public has been victimized by shoddy, defective, dangerous, or fraudulent consumer goods and services.<sup>15</sup> Research in this tradition has sought to determine which goods and services constitute the most serious and pervasive problems and to consider whether the legal resources now available to consumers are adequate to handle such problems. Again, the origins of the problems themselves in the social, industrial, or commercial environment have not typically been the subject of extensive scholarly inquiry.

As we have already noted, there is no simple one-to-one correspondence between events at this stage in our model and potential legal cases. This is true of both civil and criminal cases. To illustrate the point with regard to this first stage, we might consider the kinds of day-to-day events that could occur in a particular apartment building. One tenant, for example, might publicly insult another, or an individual might borrow and carelessly dent his neighbor's car. The perception and characterization of such events would inevitably be affected by prior dealings between the parties and by other more subjective factors. Patterns of similar conduct or the build-up of ambiguous but annoying grievances might cause an individual to view such events as significant matters where otherwise they might not be attended to. If, for instance, the insulting tenant were also the careless driver, the cumulative effect of these two disparate events might cause them to be aggregated in the minds of his victims and be perceived as a genuine wrong or wrongs. Thus the public insult might be the critical event that would cause the car owner to file a civil claim for the costs of repair. Likewise the damage to the car might lead the insulted tenant to bring a suit for

15. See, e.g., David Caplovitz, *The Poor Pay More: Consumer Practices of Low-Income Families* (New York: Free Press of Glencoe, 1963); Carol Hecht Katz, ed., *The Law and the Low Income Consumer*, New York University School of Law Project on Social Welfare Law Supplement No. 2 (New York: New York University School of Law, 1968); Warren G. Magnuson & Jean Carper, *The Dark Side of the Marketplace: The Plight of the American Consumer* 32-58 (Englewood Cliffs, N.J.: Prentice-Hall, 1968); Sidney Margolius, *The Innocent Consumer vs. the Exploiters* (New York: Trident Press, 1967); U.S., Federal Trade Commission, *National Consumer Protection Hearings* (Washington, D.C.: Government Printing Office, 1968); U.S., Congress, Senate, Committee on Government Operations, Subcommittee on Reorganization, Research and International Organizations, and Committee on Commerce, Subcommittee on Consumers, Joint Hearings on S. 707 and S. 1160, 93d Cong., 1st Sess., 1973; Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 L. & Soc'y Rev. 701 (1977); Mary Gardiner Jones & Barry Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 Geo. Wash. L. Rev. 357 (1972); U.S., Department of Health, Education and Welfare, Office of Consumer Affairs, *A National Survey of the Complaint-handling Procedures Used by Consumers*, prepared by Donald W. King & Kathleen A. McEvoy (Rockville, Md.: King Research Inc., Center for Quantitative Sciences, 1976); *Redress of Consumer Grievances: Report of the National Institute for Consumer Justice* (Washington, D.C.: National Institute for Consumer Justice, [1972]) and staff studies prepared for the National Institute for Consumer Justice; William C. Whitford, *Law and Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 Wis. L. Rev. 1006.

defamation. More indirectly, such events might cause the victim to put pressure on the landlord to evict the offending party on seemingly unrelated grounds, whether real or fictitious. Conceivably, a formal eviction suit brought by the landlord could be the ultimate reformulation of events that appeared in themselves to involve totally different substantive matters and disputants. In such a lawsuit, as in many other civil cases, there would no longer be any clearly traceable one-to-one correspondence between primary event, legal event, and resulting civil action.

Thus, the formulation of legal "cases" from this amorphous pool of primary events is a complex process that may involve the division and recombination of similar and dissimilar events into formal civil lawsuits. Such causes of action are related—often in complex and idiosyncratic ways—to the underlying events in society that generated them. The processes of civil case formulation and the often obscure relationships between primary events and civil cases are not well understood or even recognized as important issues in many instances, although their significance for the system of civil cases as a whole is obviously crucial.

To summarize, then, in this first stage we encounter an anomaly. Observers of both the civil and the criminal justice systems have attempted to explore and ascertain the frequencies with which "prelegal" litigable events occur in the population at large. Studies of the criminal area, however, have been greatly concerned with the etiology of criminal events and rather less attentive to the subsequent behavior of the participants and the variety of resources, both legal and nonlegal, that might be used at this early stage.<sup>16</sup> Studies of the civil area, on the other hand, have displayed little interest in the etiology of civil cases but have been far more attentive to the richness of alternative resources available once a primary event has occurred. We believe that this discrepancy arises in large measure from the tendency to resist viewing civil cases as a class (beyond certain rigidly delimited subcategories) and from the tendency to substitute for a potentially useful systemic perspective a view of the civil area as a collection of independent and dissimilar events and cases. This approach has limited and confined inquiry in a number of ways, as we shall attempt to show in our discussion of the remaining four stages of the civil justice system.

## *2. The Response Decision*

The second stage in the system of civil cases is the primary response

16. There appears to be an operating assumption among many criminal law specialists that the next significant step after the occurrence of the legal event is police or prosecutorial intervention and, if this step does not follow the legal event, that the case is effectively terminated.

of the parties to the stage 1 event—the interpretation and definition of such events by individuals and the choices and decisions that individuals subsequently make. This stage has been the subject of considerable attention among persons interested in civil cases, but once again we can discern a rather different kind of inquiry from that pursued in the criminal area. As is the case for stage 1, there has been a tendency to view response decisions in civil cases in terms of variations in “victim” behavior, that is, in terms of the variety of resources that individuals consult (such as lawyers, mediators, arbitrators, counselors, administrative agencies, action lines, ombudsmen, better business bureaus, and others). Observers of the criminal justice system, on the other hand, while relatively less concerned with delineating the numerous varieties of victim behavior, have devoted a great deal of attention to the structure and styles of police organization as factors that can influence initial contacts with the law. Such contacts help to determine the response decisions of individuals involved in legal events that could be characterized as criminal.<sup>17</sup>

There is no reason to think that the structure, organization, and professional styles of private law firms, government agencies, and other formally constituted legal resources<sup>18</sup> are not equally significant on the civil side in determining the response decisions of individuals. We might find in the civil system, as in the criminal system, that the organizational styles of such relatively “formal” legal resources affect (and are affected by) the decisions of individuals to consult them or other less formal alternatives or to take no action whatsoever. Nevertheless, the fact remains that this second stage in the civil process has been considered primarily by correlating particular problem types with particular resources consulted. The emphasis is on individualism rather than on the analysis of aggregate factors such as social or professional structures.<sup>19</sup> In large measure we may attribute this fact to the influence of

17. Where police accept the role of domestic relations counselors, for example, it appears more likely that family disputes will be received as part of their day-to-day case intake. Where the police are organized to handle more traditional criminal matters, such as street crimes, criminal investigations, auto chases, and the like to the exclusion of family matters, then fighting spouses may decide to take their grievances to some other resource. If a complaint does not mesh with the local police style, the individual will be rebuffed or referred elsewhere, and in time the public may learn to respond to particular legal events in the manner preferred by local authorities. The same is undoubtedly true of the practices of local prosecutors. Thus, a feedback loop is established between actual contact with authorities and the response decisions and perceptions of legal events by victims of criminal behavior. See James Q. Wilson, *Varieties of Police Behavior: The Management of Law and Order in Eight Communities* (Cambridge, Mass.: Harvard University Press, 1968).

18. Such resources include the entire range of private associations that operate to influence legal policy and precedent, from national, state, and local bar associations to single-issue interest groups organized to change or maintain the status quo.

19. Few studies of lawyers have examined in detail the effect of professional style and structure on how civil cases are handled. Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (New York: Russell Sage Foundation, 1974) is one exception. Even less common have been studies

the idealized civil-criminal dichotomy, which encourages us to view civil cases as vehicles for advancing discrete and frequently unrelated private interests of individuals or groups, in contrast to criminal cases, which are viewed as opportunities for the public authorities to assert a coherent set of public norms in particular instances of deviant behavior.

The absence of a systemic perspective in the civil area has thus had a profound effect on the understanding of this second stage. Having accepted the assumption that the seemingly centralized institutional and normative structure of the criminal area does not characterize the civil area, analysis of stage 2 of the civil system (individual response decisions) has typically been carried out without reference to the organizational features of the resources from among which individuals choose. The result once again is anomalous. In the criminal system, individuals are seen to act under significant constraints imposed by the structure and styles of the institutions that might handle their cases. In the civil system, on the other hand, individuals are seen to act with much greater independence, less constrained by local variations in institutional structures and styles, making rational cost-effectiveness choices among the various alternatives available in the legal marketplace. Unless we can believe that basic human behavior can differ so markedly from one situation to another, we must conclude that the very foundation of the analysis has been affected by preconceived (and, we believe, seriously limited) views of the entire civil justice area itself.

### 3. *Pre-judicial Processing*

Most potential civil cases drop out, in one way or another, from the initial pool of primary events before reaching the third stage—pre-judicial processing. This stage takes us from initial contact with a legal authority capable of pursuing litigation, typically a practicing attorney, to the point where formal judicial processes actually begin.<sup>20</sup> In this stage, as in the preceding stages, the attrition rate is high. Nevertheless, the pre-judicial processing of civil cases is characterized by certain

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of other professional or voluntary groups or organizations exploring the effect of their style and structure on civil case processing.

Organizational effects on case handling in the urban setting are also discussed in Herbert Jacob, *Urban Justice: Law and Order in American Cities* (Englewood Cliffs, N.J.: Prentice-Hall, 1973). Jacob begins by observing, "Just as the police are the principal gatekeepers regulating the flow of criminal cases to the courts, so the legal profession is the chief regulator of the flow of civil cases." *Id.* at 34. In an influential study of the availability of lawyers' services, Barlow F. Christensen discusses at length the relationship between structural elements of law practice and how legal matters are handled by lawyers. Barlow F. Christensen, *Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services* (Chicago: American Bar Foundation, 1970).

20. Litigation can, of course, be pursued *pro se*, but this is still a relatively infrequent occurrence.

regularities and consistencies that provide us with further justification for viewing civil cases in systemic terms.

The handling of civil (and criminal) cases in stage 3 follows two distinct procedural patterns. First, numerous cases are simply marked for later expeditious judicial handling in the next stages. On the civil side, these would include such cases as evictions, collections, and most small claims. On the criminal side, their counterparts would be minor traffic offenses and various misdemeanors punishable by small fines. Second, a significant number of cases—both civil and criminal—are handled by extensive pretrial negotiation with the goal of reaching a private settlement. For these cases, pre-judicial processing is crucially determinative, and formal judicial handling is relatively insignificant.<sup>21</sup>

We are suggesting, in other words, that the civil system features a mode of pre-judicial case processing analogous to the pervasive and widely noted procedure of negotiating pleas in the criminal system. This mode of processing might, if examined with the kind of attention devoted to plea bargaining, prove to possess its own regularities across a broad variety of case types. Certainly there appear to be common factors at work in most civil cases which encourage such negotiations, and these factors are enhanced in many instances by laws governing pretrial procedures which themselves stimulate the processes of communication and settlement. Typically, once the legal problem has been defined, its implications, costs, and benefits assessed, a lawyer engaged, and the course of action decided, the lawyer initiates contact with others involved in the situation to explore the settlement of the problem directly. Often such contact by an attorney is sufficient to initiate negotiations toward a settlement where the efforts of an unrepresented party would fail. This, it should seem, occurs because the presence of the attorney is an implicit threat to sue, a signal that the parties are serious about the issue and willing to stand up for their rights and to commit some resources to pursuing them (whether or not they really intend to litigate) and thus a challenge to the adversary either to settle or to make a similar commitment of resources.<sup>22</sup> Contact by the attorney also consti-

21. The analogy of the civil to the criminal system at this stage is clearly apparent. It is by now a commonplace to observe that the vast majority of criminal cases processed by police and prosecutors never go to trial but are disposed of in the pre-judicial stages, generally by dismissal, diversion (usually taking the form of a conditional dismissal), and plea bargaining. Negotiation is dominant, particularly in plea bargaining. When this occurs, the prosecutor agrees to drop a more serious charge in exchange for the agreement of the accused to plead guilty to a less serious charge. Often the prosecutor also agrees to recommend to the judge a particular sentence as part of the agreement, a recommendation that typically is followed. Thus the traditional vision of the prosecutor as investigator, marshaler of evidence, and advocate and of the court (judge or jury) as trier of fact and decider of guilt and punishment gives way to a perception that pre-judicial disposition is the rule and that the fate of criminal cases is determined largely by police and prosecutors through negotiation with the accused. Compare Jacob, *supra* note 19, at 65-68.

22. Cf. *id.* at 121.

tutes an implicit invitation to negotiate by providing in itself an avenue of more objective communication.<sup>23</sup> For whatever set of reasons—rational or irrational, objective or subjective—the intervention of a lawyer frequently leads to settlement negotiation.

Even when such early lawyer contacts fail to produce a settlement, negotiations may prove effective after a civil lawsuit has been filed.<sup>24</sup> For example, in personal injury practice it is often almost routine to file a lawsuit, with the expectation that negotiations will occur after the filing and not before. Actual trial and adjudication of such cases is rarely anticipated. Once a civil lawsuit is filed, the intricacies of pretrial procedure provide a new framework for negotiation, which is partially supervised by the court. Pretrial motions, discovery, and pretrial conferences provide strategic information as well as leverage in the negotiations, and cases are frequently settled at each of these points. The entire involvement of the formal legal system, however, remains under the control of the disputing parties who may terminate that involvement at any time and close the matter or return to private negotiations. It is not unusual, for instance, in complex commercial civil disputes, for the parties to negotiate unsuccessfully for several months, then file suits and countersuits, motions and countermotions, and wrangle over discovery requests until some particular document or fact is revealed through discovery. At this point the lawsuit may be abandoned, and there may follow months of private negotiation leading to a lengthy settlement contract defining the relationship between the parties for years to come. Or, as another example, the ruling on a motion for the subpoena of medical records may cause a personal injury plaintiff to accept a settlement offer that has been refused for several years and suddenly cut short a protracted dispute at the pre-judicial stage of processing.

In the third stage, therefore, we may discern a regular pattern of negotiation and settlement that is clearly analogous to the pattern of pre-judicial processing in the criminal justice system. The regularities of this process may be hidden, as was the case in the two preceding stages, by a reluctance to view the civil area as a coherent and somewhat regularized system. But once again it would be a mistake to adopt such an exaggerated view of the civil area as decentralized, atomistic, and controlled by the individual whim of the plaintiff. Indeed, in this third stage it becomes apparent that civil cases can centralize and aggregate legal interests in a manner quite comparable to criminal cases, and that criminal cases, on the

23. See Simmel's discussion of "The Triad" (1908). Georg Simmel, *The Sociology of Georg Simmel*, ed. & trans. Kurt H. Wolff, 145-69 (New York: Free Press, 1950).

24. Although a filing has already occurred, for purposes of our analysis we shall group such pretrial negotiations under the heading of stage 3 (pre-judicial processing) rather than with the formal and more traditionally conceived activities that occur in stage 4 (judicial processing).



other hand, may reflect and respond to private individual concerns far more than is commonly recognized. Thus, criminal cases at this stage are often controlled as decisively by the victim-complainant as by the police and prosecutors. It is typically the victim's individual decision to press charges and cooperate with the authorities or to refuse and all but compel the prosecutor to dismiss the case. One common reason that victims decide not to press prosecution is that reconciliation or restitution has been privately negotiated. When criminal cases are dismissed in this matter, the process closely resembles the settling of a civil case.

By the same token, the seemingly individualized and unsystematic handling of civil cases in the pre-judicial stage actually possesses significant functional regularities. It is important to recognize, for example, that such cases often represent far more than the private interests of discrete individuals. On the contrary, many types of civil cases formally aggregate the shared interests of numerous individuals in one way or another, making them akin to the classical concept of criminal offenses against the social collectivity. Such cases include not only corporate actions brought (theoretically) in the interests of numerous shareholders but also class actions and civil enforcement suits brought by regulatory agencies, such as antitrust, securities, environmental protection, and unfair and deceptive practices cases. Other sorts of civil cases informally aggregate collective interests in a single lawsuit by means of a collective or corporate plaintiff—such as a business, church, social reform or community organization—or when one plaintiff, such as a collection agency, litigates to secure claims against the defendant by a number of individuals who have assigned their interests to the agency. Similarly, an insurance company, as defendant in numerous unrelated personal injury cases, may bargain with a lawyer over all the cases he has filed against the company, treating the claims as a package and striking an aggregate bargain rather than negotiating on the merits of each individual case.

Civil litigants, like public prosecutors in criminal cases, may seek to enforce explicit state policy, as when individuals bring suit as "private attorneys general" in antitrust or environmental cases. Civil cases can invoke such relief as "civil fines" or punitive damages, which resemble criminal sanctions as much as civil compensation. Such cases may also seek injunctions or "consensual" cease and desist orders—which may be seen as analogous to criminal probation or suspended sentences—with the overhanging threat of "civil" contempt which, when invoked, places offenders in "civil detention" in the same jails that house those detained by the criminal justice system.

It is therefore a mistake to assume that civil cases, unlike criminal

cases, reflect only the interests of discrete individuals. On the contrary, as we have seen, civil cases may be controlled by state policies and collective interests of group members, shareholders, and creditors. Once we understand this important fact about civil cases, we can begin the analysis of why and how negotiation is conducted and settlements are achieved in the pre-judicial processing of civil cases and explore the relationships between this form of negotiation and the pre-judicial processing of criminal cases. To view the processing of civil cases as a coherent system possessing common features across a variety of case types is, once again, to make possible a realistic analysis and appreciation of the underlying regularities of norms, structures, and procedures that are, we believe, characteristic of the entire civil system.

#### 4. *Judicial Processing*

The fourth stage in the processing of civil cases is the most visible and symbolically important of the five. Both the popular and the professional images of the legal system place the judge at the center of the legal process. The common law judge is the very fulcrum of justice upon whom rests the integrity of the legal process—finding facts and deciding outcomes in both criminal and civil cases. Yet as we have already seen, an analysis of the legal system as it actually operates reveals that few civil matters ultimately reach this stage, and it is thus relatively rare for judges by their direct actions to determine case outcomes in the system of civil justice.

Even when we focus on judicial processing itself, disregarding for the moment the numerous cases and events that have dropped from the system in the three preceding stages, the active role of the judge recedes further from our grasp.<sup>25</sup> In place of the traditional image of the judge's controlling and deciding outcomes in the cases brought before the court, there emerges a rather different picture involving three typical modes of judicial processing, all characterized by substantial de facto delegation of the judge's powers of decision and disposition. We shall discuss each of these three modes in turn.

The first mode of judicial disposition is the routine processing of cases with nominal judicial intervention. The vast majority of civil cases are disposed of by routine orders of the judge as a result of the failure of service of process, the failure of defendant to answer or appear, or the failure of the plaintiff to follow through with the case (whether resulting from abandonment or settlement). Final orders entered in civil cases for such reasons are formally judicial dispositions. In fact, how-

25. Jacob, *supra* note 19, at 63-68, makes a similar point.

ever, the dispositions of these cases have actually been determined in the third stage, and judicial activity is typically limited to signing large piles of orders prepared and submitted by the court clerk, or by one of the parties, without significant judicial attention. Occasionally the judicial role is limited still further to a literal rubber stamp of the judge's signature applied to such orders by the clerk. While this form of judicial processing may appear mechanical and rather trivial in comparison to the other more demanding activities of the judge, it is significant because in the civil area—and in the criminal area as well—it is the most frequent mode of judicial disposition. In effect the judge has delegated to the clerk or to the unopposed civil plaintiff the task of determining whether the preliminaries to trial have been carried out properly and of preparing final orders for cases where the parties are not ready for full judicial processing.

The second mode of disposition involves cases in which the parties have already agreed on the outcome and seek the judge's approval. In this situation, the judge's intervention is clearly significant but limited primarily to supervision—ensuring that the *de facto* delegation of judicial power to formulate a case outcome has been properly exercised and that there has been no fraud or overreaching. The process is comparable to the judicial role in criminal cases, where the judge often acts as umpire to see that lawyers, police, and prosecutors have played fairly in arriving at the point of suggesting a bargained plea or “consent” judgment to the court. In such criminal cases, defense lawyers routinely file motions attacking the arrest, investigation, and detention on the basis of various constitutional and statutory rights. The judge must then determine that the police gave the proper warnings to the suspect, that the line-up identification was properly carried out, that the right of counsel was not denied, that the suspect was not detained unreasonably without judicial hearing, that searches were conducted with proper warrants, and so forth. Again, at trial, the judge must be satisfied that the criminal defendant understands the nature of the proceedings, that any plea bargaining was done with the defendant's consent, and that he or she fully understands and consents to the agreement that was reached, including the sentence to be imposed. Thus, the judge in a criminal case reviews the performance of those to whom he or she has in fact delegated much of the power to hear and decide cases and sentences, and the judicial role as a consequence is mainly supervisory.

Similarly, in civil cases the judge is very often in the position simply of reviewing the adequacy and fairness of the process by which the parties have reached and agreed upon the outcome submitted for judicial approval. In divorce cases, for example, the main contest typically in-

volves the division of property and arrangements for custody and support of children. These matters are usually handled by protracted negotiations between the parties, in which the judge plays little direct role except occasionally to order the production of certain documents or depositions and, ultimately, to review the settlement agreement submitted by the parties. In these situations the judge will most often satisfy himself that both husband and wife participated in the negotiations and understand what was agreed and how it will affect them and the children, if any. The judge will also ensure that the interests of the children have been properly considered and taken into account. If procedural fairness has been maintained, many if not most judges will refrain from evaluating the substantive details of the agreement and will simply accept it as expressing the will of the parties. In other sorts of civil cases, the stipulation of facts between the parties is a most common way of simplifying and expediting matters, and the judge rarely looks beyond the stipulation unless there is reason to doubt that the parties understand what is stated in it. The judge typically adopts criteria similar to those used in hearing a motion to set aside an arbitration award. That is, he or she will not usually evaluate the substantive fairness of the agreement or award unless there are indications of fraud, conflict of interest, or other procedural irregularity.

The third mode of judicial processing is used on those relatively uncommon occasions when a civil case is fully and formally tried in court. Even on these occasions the judge spends a significant amount of time in a supervisory role. The judge enforces rules of procedure and decorum in the courtroom by controlling the manner in which evidence is presented and by ruling on objections and procedural arguments of counsel as to the proper process to be followed. The substance of the case is, for the most part, put forward according to procedural and strategic decisions made by the attorneys. In jury trials the judge then supervises the presentation of the case to the jury, which, after receiving its instructions (typically drafted in preliminary form by counsel), decides on the disposition. Even in bench trials, where the judge in a sense exercises the power of decision to the fullest by issuing findings of fact and final judgments, one still sees much of the work and thought delegated to the lawyers involved. Typically, opposing counsel submit alternative findings of fact and final orders to the trial judge, who then chooses between the arguments of the attorneys instead of taking the initiative to formulate the decision in detail. Even at this climactic moment of decision, the judge frequently delegates to the lawyers the critical task of defining the situation and the issues to be addressed so that only a yes-or-no judicial decision is required. Trial lawyers typical-

ly argue their cases by citing appellate decisions to the judge. That is to say, they invoke the authority of higher courts that have issued rules and decisions which are in turn delegated to the trial judge for implementation. Thus, the trial judge both delegates and is delegated to. The judge is a manager in the typical bureaucratic mold. Despite the possession of crucial dispositive power, the judge as supervisor is less actively involved in the process of substantive decision making than is usually reflected in popular and professional models of the judicial process.

These three modes of judicial processing thus present us with a picture of the fourth stage rather different from that usually perceived by the general public. In the relatively few civil cases that enter this stage for judicial processing, control over details of the outcome often rests largely with the parties and their lawyers. Trial judges act as overseers of the process, but their primary role is of necessity supervisory and usually quite routinized. Delegation of authority typifies this stage, shifting the judicial power both from appellate to trial courts and from judges to clerks, lawyers, and clients.<sup>26</sup> Some of the implications of this model of judicial processing for the civil justice system as a whole will be discussed in section II of this paper.

### *5. Implementation and Consequences*

Although trial dispositions are usually thought to be the ultimate and final event in the life of civil lawsuits (except for appeals), this is frequently not the case. A systemic model of civil case handling encourages us to look beyond the formal disposition of cases to a fifth stage in which judicial decisions are implemented and their consequences made apparent to all concerned. Some of the most crucially significant aspects of many civil cases are related to this fifth stage. Despite its relative obscurity, we suggest that this part of the life cycle of civil cases may provide some important clues to understanding the system as a whole. In this sense the civil system once again resembles the criminal. A criminal defendant who has been found guilty and sentenced to prison, for example, knows that the most critical decisions affecting his fate still lie ahead: What type of confinement will he undergo? What arrangements for parole or work-release will be permitted?

26. Our emphasis on trial courts should not obscure two vital functions performed by appellate courts in our model. First, appellate review serves to supervise trial court processes as well as to revise and refine rulings by trial judges and the legal framework from which such rulings derive. Second, judgments issued by appellate courts, like those issued by trial courts, disseminate norms and order behavior within the legal system and in society generally. Indeed, because of their greater visibility and prestige, appellate courts are often far more influential than trial courts in this regard.

How long will the period of incarceration actually be?<sup>27</sup> In civil cases, too, the parties may be affected most significantly by what happens after the judge signs the final order or judgment. This may occur both through subsequent formal court proceedings to enforce and implement the judgment and through a variety of informal consequences of the case disposition. We shall discuss each of these in turn.

Once a final judicial disposition of the case has occurred, the winner of a civil judgment is left to reap the benefits of a favorable verdict. In some instances this may be the only problematic part of an otherwise uneventful and often uncontested case. In handling evictions and collections, for example, it is typically anticipated that this fifth stage will be the point where routinized and mechanical verdicts finally take hold of the participants and, in the course of supplementary proceedings, will forcefully alter the relationship between plaintiffs and defendants. The judgment creditor may invoke an elaborate set of procedures to collect the judgment. These include wage assignments, wage and nonwage garnishments, levy and execution on assets, liens against property as security for the payment of judgments, and in some cases associated *lis pendens* notices.<sup>28</sup> There is a distinctive procedure for discovering assets of the judgment debtor which may be available for payment of the judgment. This discovery procedure features its own processes of arrest, contempt, and punishment for noncompliance. It is worth noting, however, that even in this formal stage of enforcement the actual effect of judicial coercion is frequently to initiate an informal settlement of the matter through direct negotiations between debtor and creditor.<sup>29</sup>

In divorce proceedings, to choose another example, individuals who at trial are awarded regular child support or alimony payments (typically through default or consent judgments) may seek the aid of the court subsequently to ensure that such payments are actually made. Through supplementary proceedings, often by means of reciprocal en-

27. Even in those cases in which a criminal trial judge actually convicts and imprisons a defendant, the judge is keenly aware that significant discretionary decisions will reside with others in the criminal justice system. Thus, even for individuals who are sentenced to terms of imprisonment, the prison authorities will decide what sort of a prison to place them in (this may range from solitary confinement or a Bastille-like maximum-security fortress to a work-release or a low-key minimum-security camp or farm), and the parole board will decide how long a term the individuals will actually serve.

28. Although *lis pendens* notices are filed earlier in the process of litigation (stage 3 or stage 4), the purpose for which they are filed is to tie up assets as security for eventual collection, and thus they anticipate and have their impact in stage 5.

29. Jacob reports that the "expected outcome of garnishment actions" from the creditor's point of view is out-of-court negotiation rather than formal enforcement: "Garnishments were an effective way to contact debtors when all other methods failed. When their wages were withheld, most debtors contacted creditors and made new arrangements to pay their debts." Herbert Jacob, *Debtors in Court: The Consumption of Government Services 100-101* (Chicago: Rand McNally & Co., 1969).

forcement of support laws involving two or more states, such individuals may attempt to enforce their legal rights by garnishments or even imprisonment. Similarly in mortgage foreclosures, which may be processed in a relatively mechanical and often uncontested manner before judgment, the implementation process *after* judgment can involve decisive intervention by the sheriff, who will seize the property, sell it, and distribute the proceeds.

The crucial importance of this final stage in the civil justice system resides not only in the formal measures that can actually bring to life the rights and duties of litigants but also in the numerous informal consequences of civil litigation. Such consequences may also have great significance for the parties in determining strategies employed in the earlier stages of civil cases and the willingness of individuals to use the civil system in the first place to enforce their claims (feedback of this kind will be more fully discussed in section 6). If we were to seek an analogue in the criminal system, it might be the FBI "rap sheet"—a record of police arrests and dispositions of cases involving a particular individual. Although arrests, unlike convictions, have no weight in the formal determination of guilt or innocence, their informal significance is great indeed. The rap sheet may influence a later prosecutor's decision whether or not to bring suit, and it may also affect plea bargaining, the judge's sentencing decision, the prison authorities' placement decision, the parole board's release decision, and the likelihood that the police will investigate and rearrest the individual on suspicion of similar offenses in the future. Needless to say, a formal conviction can stigmatize the individual even more than an arrest, and the subsequent informal consequences often include the inability to find employment, to obtain credit, or to be trusted in innumerable ways by neighbors and by society in general.

On the civil side, trial court judgments and pre-judicial processing also have similar, if less elaborated, informal consequences. In some areas there is a civil equivalent of the rap sheet. Through the pooling of insurance information, insurers learn of individuals who have filed numerous or frivolous claims or who have litigated with their own insurance companies, and such individuals are in some instances penalized or denied insurance coverage altogether. Similarly, an employee who makes a complaint to a government civil rights or antidiscrimination commission is well known and often blacklisted within his or her company, area, or industry. These and similar consequences are based solely on the initiation of legal proceedings, just as the rap sheet can be based solely on the arrest. The informal consequences of a civil judgment are, of course, even greater. Judgments against a person often

play an important part in credit rating, for instance. A judgment of civil liability can be and often is the basis for professional sanctions such as disbarment, deregistration of a broker-dealer by the Securities and Exchange Commission, and the like. Similarly, the receipt of one or more wage garnishments against an employee has frequently been the basis for firing, thus making it difficult for the employee to find other employment.

The potency of these informal consequences may discourage the initiation of civil litigation by those who fear their effect or encourage those who wish to put their adversaries at risk. In this sense, the informal consequences are just as important for the litigants as are the formal procedures provided by the court to implement judgments. Indeed, we suggest that the formal and informal aftermath of litigation is so vital a part of the civil justice system that it affects even the earliest stages we have discussed. That is, the real and anticipated consequences of civil litigation may affect the numbers and kinds of primary events that take place (stage 1), the nature of the response decision by participants in such events (stage 2), and the effectiveness of pre-judicial processing (stage 3) by those who wish to avoid or to embrace formal litigation (stage 4).

### *6. Interaction Among the Five Stages*

Interaction among the five stages of the civil justice system is not limited to the impact of the aftermath of adjudication (stage 5) on the earlier stages. Rather, interaction and feedback among all of the stages typify the system as a whole and bind it together. It appears, then, that the civil system is characterized not only by the temporal movement of events and cases through one or more of the five stages but also by nonsequential effects and impacts that each stage has on every other stage. Through this pattern of interrelationships the system as a whole achieves and maintains a unity and consistency over time.

We may thus visualize the civil justice system not only in linear or sequential terms (the "pyramid" model described earlier and depicted here in figure 1) but also as a network of interactive parts which come into contact with one another through the vital force of legal matters passing into and out of each of them. This latter conceptualization is depicted in figure 2. Let us illustrate this conceptualization by describing briefly a few of the typical forms of interaction that occur among the various stages of the civil system model we have presented.

As we have already noted, stage 1 has perhaps the most pervasive influence on the other stages in the system. Thus, for example, the occurrence of primary events and individuals' perceptions of them as legally



significant in stage 1 are necessary preconditions to formulating particular response decisions in stage 2. Such has been the case in the area of medical malpractice litigation. While it is unclear whether the occurrence of medical malpractice has actually increased in recent years, heightened public sensitivity to the behavior of doctors and the responsibilities of the medical profession (stage 1) has clearly been associated with more frequent decisions to hold doctors legally accountable (stage

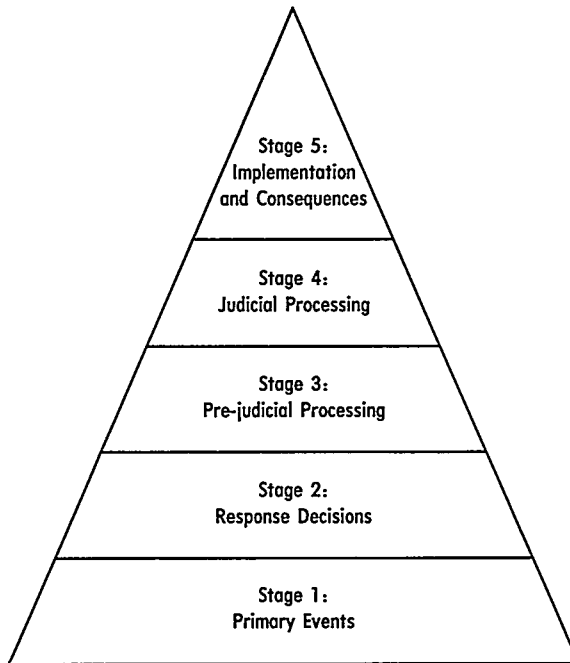


Fig. 1. Sequence of stages in the civil justice system

2). Stage 1 interacts in equally obvious and significant ways with stage 3. For example, the extent of injuries and the degree of outrage in a personal injury case (stage 1) typically influence the likelihood as well as the substance of pre-judicial settlement (stage 3). Similarly, the nature and frequency of events in stage 1 can have a major impact on judicial processing (stage 4). For instance, numerous strikes by public employees in a particular city might lead to judicial sanctions more severe than would be applied in an isolated case of this type. Stage 1 events can also shape the nature of stage 5 consequences of adjudication. For example, the stigmatizing effects of divorces in the present era (like the effects of insolvencies during the Depression) have diminished as such stage 1 events become more common in our society.

Feedback from later stages can also affect the first stage. Thus, the initiation of a novel legal claim (stage 2) or a well-publicized settlement (stage 3)—may have distinctive effects on stage 1. For example, notoriety of recent claims for “palimony” (involving unmarried persons who once lived together) have already affected public conceptions of conduct and obligation on the part of cohabiting couples who choose not to marry. Similarly, dramatic settlements in product liability cases (such as those involving dangerous or defective consumer products) have influenced attitudes toward the relationships and responsibilities among manufacturers, distributors, and consumers as well as the actual designing and manufacturing of products themselves. The adjudication of civil cases (stage 4) can also lead to new definitions and perceptions of

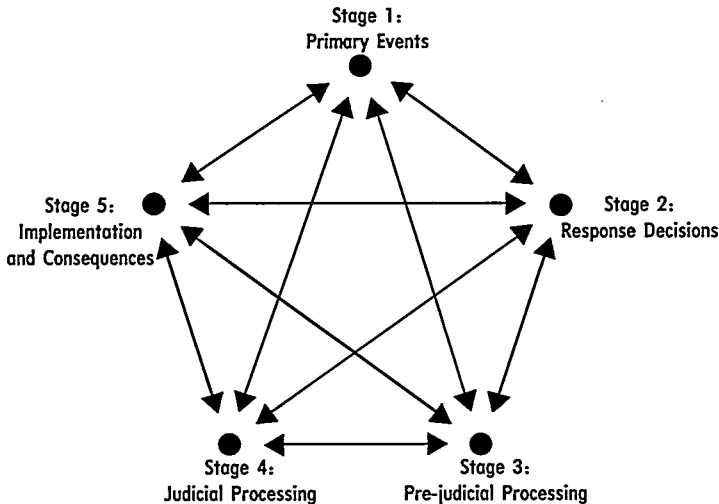


Fig. 2. Patterns of interaction in the civil justice system

events in stage 1. For example, decisions in civil rights cases have had significant effects on the behavior of public officials, employers, and others.<sup>30</sup> Similarly, the manner in which civil judgments are enforced and the consequences of such judgments (stage 5) have clearly restructured relationships between landlords and tenants, finance companies and their customers, divorced spouses involved in alimony and child support arrangements, debtors and creditors, and others.

Stage 2 (the response decision) is likewise part of a network of interactions involving the other stages. We have already noted some of the interrelationships between stage 2 and stage 1. It is also obvious that a

30. The impact of judicial decisions on attitudes, perceptions, and behavior may be heightened by the publicity and added visibility of appellate review.

large number of response decisions (stage 2) leading to the litigation of civil cases at any one time can congest court calendars and produce delays that increase incentives for significant activity at the pre-judicial stage (stage 3). Such activity might involve more strenuous attempts to reach a private settlement or the increased recalcitrance of one party in order to stall negotiations for strategic purposes. These and other kinds of response decisions in stage 2 can similarly affect formal adjudication (stage 4). An increase in child abuse reports, for example, may influence party strategy and judicial decision in cases involving child placement or custody. Likewise, particular types of stage 2 response decisions may have a significant impact upon the implementation and consequences of adjudication (stage 5). To cite one example among many, when a debtor misses a payment on a car-financing agreement, the creditor can respond (stage 2) by deciding to initiate litigation or by exercising his right to repossess. If he chooses the former alternative, then a distinctive set of court-enforced collection procedures (stage 5) becomes available together with such related consequences for the debtor as a damaged credit rating, which might not result from the more private and localized stage 2 decision to repossess the car.

Once again, feedback in the reverse direction toward stage 2 may be observed. The complexity, expense, and delay of pretrial discovery procedures (stage 3) is, for example, a widely noted factor in the decision (stage 2) whether to litigate or to seek other kinds of remedies in other forums. Similarly, judicial decisions (stage 4) enunciating doctrine and policy in particular kinds of cases can influence individual assessments of the profitability of litigation as compared with the pursuit of remedies by other means or the abandonment of a claim. In a closely comparable way, the effectiveness and stigmatizing impact of postadjudication processes (stage 5) undoubtedly influence stage 2 choices through which individuals decide how to respond to various legal events.

The interaction among the remaining stages—3, 4, and 5—follows a similar pattern. A few more examples may serve to illustrate our point. Stage 3 (pre-judicial processing) can have a clear and direct impact upon stage 4 (judicial processing), for instance, when facts uncovered in discovery proceedings affect testimony in court or are themselves introduced into evidence and help to determine how the case is adjudicated. Stage 3 can affect stage 5 (implementation and consequences) in equally obvious ways. For example, pretrial discovery of crucial facts or previously unknown documents or witnesses can render the trial itself a mere formality and vest great importance in the implementation or enforcement of routine adjudications. Similarly, in such matters as

divorces with property settlement agreements or in evictions, mortgage foreclosures, and collection cases, pretrial agreements often specify the precise stage 5 enforcement proceedings that will be used if the agreements are breached. Feedback in the other direction is also significant for stage 3. How a court handles particular types of cases in stage 4—such as probate cases, adoptions, divorces, or automobile injury cases—can provide guidelines for future cases which will shape such pre-judicial activities (stage 3) as the willingness of a single lawyer to act for all parties in interest (particularly in divorce cases), pretrial settlement negotiations, admissions of fact, and other strategic decisions. Similarly, the availability of swift and effective enforcement procedures (stage 5) can influence significantly the ways in which pretrial negotiations (stage 3) are conducted and can stimulate settlements among individuals who wish to avoid the social stigma of evictions, foreclosures, garnishments, and the like.

Finally, the interaction between stages 4 and 5 should by now be quite apparent. Particular kinds of judgments are sought and awarded (stage 4) with an eye to their enforceability and impact on the lives of the parties (stage 5). Similarly, the availability or nonavailability of particular enforcement procedures (stage 5) can cause a court to issue judgments in one form rather than another (stage 4) or to continue a case to permit more time for settlement where it appears that a negotiated outcome is more likely to succeed than an adjudicated outcome whose implementation would be problematic.

These, then, are a few of the countless ways in which the five stages of the civil justice system interact with and reshape one another. Even these brief examples suggest that the interactive model depicted in figure 2 is perhaps the more appropriate and useful way to conceptualize case processing within the civil system as a whole. We suggest that the structure and function of the civil justice system is, in large measure, a product of internal interactions such as these, although forces external to the system also affect it significantly. Perhaps the most intimately related of these external forces is the criminal justice system. The manner in which the civil and criminal systems interact with and affect one another is worthy of special attention and will be considered along with other environmental factors in the section that follows.

## **B. Interaction and Feedback Between the Civil and Criminal Systems**

The "civil justice system" we have outlined is a model reduced to its bare essentials. In fact, however, this system is not free-standing or self-contained but is linked in many vital ways to its broader legal, social,

and cultural environments. In this section we shall explore one kind of linkage: the interactions between the civil system and its counterpart, the criminal system. Our discussion of these two major realms of law was, in the preceding section, confined to certain illustrative analogies between them. In this section, however, we shall argue that the civil justice system is not only analogous in many respects to the criminal justice system but also interactive with it at every stage.<sup>31</sup> The two systems interpenetrate and affect one another so profoundly that the system of justice in civil cases cannot be understood without directing our attention to its criminal counterpart. Only when it is viewed in this broader context can the civil system's role within the structure of law as a whole be clearly perceived. In this section, therefore, we shall retrace briefly the five stages of the civil system, discuss some of the important interconnections between civil and criminal aspects of legal cases, and suggest how these relationships may influence and reshape the processing of civil cases at every stage.

### *1. Civil and Criminal Aspects of Primary Events*

In the first stage (the primary event), there is a particularly striking shift and flux among events that may ultimately be labeled either civil or criminal. In the most basic sense, the interaction between civil and criminal aspects at this stage is a matter of overlap. That is, many potentially actionable events and aggregations of events could serve as the basis for either civil *or* criminal processing or both. The two systems in such instances merely view the same subjects from different perspectives. For example, an event that might be viewed from the criminal perspective as assault and battery could appear from the civil perspective as a simple tort or as a domestic relations problem (e.g., grounds for divorce or removal of a child from abusive parents). Likewise, homicide, embezzlement, and reckless driving might be

31. We do not mean to imply that the civil and criminal systems are parallel in all respects or that every legal event in society could enter either system. In different social and cultural contexts the two systems may be developed and emphasized in rather different ways. The development of our own legal system has placed heavy emphasis on restricting the applicability of criminal sanctions as, for example, in the constitutional requirements of clear and prospective public statement and narrow construction of criminal laws. This emphasis has introduced an asymmetrical relationship between the two systems in our society such that many civil causes of action could not be prosecuted as crimes under the existing criminal statutes. On the other hand, most crimes could be construed as violations of civil standards of conduct. *Restatement (Second) of Torts* § 288B (1965), for example, states how civil standards defining negligence may be derived from criminal legislation.

This asymmetrical relationship between the civil and the criminal systems in our own society does not necessarily hold true in other settings, where quite different patterns may be observed. In some legal systems, for example, nearly all "civil" causes of action may be processed as crimes and regarded as offenses against the collectivity. Indeed, in our own system, causes of action now considered exclusively civil in character may once have been prosecutable as crimes or may in the future be so defined.

viewed, respectively, as civil wrongful death, breach of fiduciary relationship, and negligent damage to property. The characterization of such events as civil or criminal is a product of our own retrospective view, our knowledge of what these events may ultimately become if they should proceed to litigation. In actuality, however, such events in the lives of ordinary people do not usually present themselves in clear-cut, dichotomous terms.<sup>32</sup> The classification of a primary event as civil or criminal at this initial stage in the life of a case is often a product of the observer's pre-existing professional and cultural orientation rather than of some feature intrinsic to the event itself.<sup>33</sup>

The interaction between civil and criminal aspects at this stage, however, goes somewhat deeper. The very definition of what constitutes a "legal event" is highly problematic and seems to depend as much on the basic cultural norms in the society at large as on the more formalized "law on the books." The interplay between culture and formal law has great significance for both the civil and the criminal systems.<sup>34</sup> For purposes of illustration, we shall present four hypothetical situations in which different cultural definitions of "legal events" produce strikingly different results for the civil and the criminal systems, even when the formal laws and legal structures are presumed to be the same in each case.

First, we might imagine a society whose cultural orientation toward law was tough minded, aggressive, and particularistic. In such a society, every technical violation would be viewed as actionable, even minor bumps or casual remarks that would pass unnoticed elsewhere. In this society, we hypothesize, the pool of events defined as legal by a "reasonable observer" within the society would be very large, and both the criminal and the civil aspects of such events would be emphasized. That is, most people within the society, including the legal professionals and government administrators, would perceive a great many civil and criminal events in their day-to-day lives which they would believe could properly be litigated.

A second society might be marked by a nonlitigious, passive, accepting orientation toward technical violations of the law. The result here would be the opposite of the first: the pool of primary events that might lead to "nonfrivolous" litigation would be very small in the eyes

32. See Eric H. Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. Pa. L. Rev. 1107, 1107-10 (1975).

33. Just as the perception and characterization of primary events as "legal" or "nonlegal" result from a process of labeling, the perception and definition of legal events as civil or criminal in character result from a further labeling process. See note 12 *supra*.

34. See Lon L. Fuller, *Anatomy of the Law* (1968; reprint ed., Westport, Conn.: Greenwood Press, 1976), especially his discussion of how behavior and formal rules contribute to the existence and meaning of law (at 8-11) and of "implicit elements in made law" (at 57-69).

of the reasonable observer, and both the criminal and the civil aspects of such day-to-day events would be ignored.

Our third example is a society in which major substantive violations of the black letter law would be harshly punished for exemplary purposes and for purposes of deterrence, but in which there would be less concern with minor, trivial infractions. In this setting, we hypothesize; the criminal law would be viewed as properly embracing a relatively small number of important events in the society, while the civil law would be seen as the proper channel for a somewhat larger number of "minor" events and disputes. Thus the criminal aspects of potentially litigable events would become more important but less widely applicable than the civil.

In our fourth example, the opposite would be the case. In this setting, the activities of large corporate entities and complex organizational structures would be considered highly important, and the regulation of events relating to such activities would be seen as the essence of the law. We hypothesize that, in this society, the reasonable observer would see a relatively small pool of extremely significant legal events that he or she would classify primarily as civil in character. In addition, there would be a relatively large pool of minor technical violations—relating to law and order, safety on the streets, and the suppression of minor day-to-day hazards that threaten the well-being of private individuals—which the observer would perceive as criminal in character.

Obviously these four illustrations have been simplified for purposes of discussion, and many other mixes are conceivable. From time to time and in different localities we may observe in our own society a tendency toward one or another of such situations. The point we want to make, however, is that the "vast pool of legal events" which we described in section A is by no means a sharply delineated aggregation that separates clearly into its civil and criminal elements. On the contrary, both the size of the pool and the labeling of particular events as civil or criminal depend primarily upon the role of law in its broader cultural context. Reference to the black letter law in itself will not necessarily help us to interpret and classify daily events such as conflicts, reconciliations, transactions of substance, physical impacts of different kinds, the formation and dissolution of various alliances and associations, deaths, divorces, and so forth. The black letter law does not provide us with an objective standard for judging whether each knot in the social fabric constitutes a valid cause of action, for in itself the black letter law cannot distinguish between the litigability of a friendly slap on the back and the homicidal swing of a baseball bat. In the technical sense, both events could become lawsuits, yet familiarity with our own particular

culture leads us to classify the latter but not the former as an embryonic law case and to emphasize in all probability its criminal rather than its civil aspects. Thus in the first stage of the civil system we find an extremely important cross-relationship between civil and criminal aspects of the "law in action" and the law on the books. The interplay between these elements significantly determines the number and kinds of cases that flow into the civil and the criminal systems.

## *2. Civil and Criminal Response Decisions*

In viewing the interaction between civil and criminal aspects in the preceding stage, we spoke of the "reasonable observer" who would view and interpret day-to-day events in a particular society. In discussing actual response decisions (stage 2), however, our focus must shift from the reasonable observer to the actual participant, a person who is perhaps less broad in his perspective, less rational and dispassionate in his interpretation, and more concerned with his own narrow interests than with principles of general application. An individual, in reacting to a primary event, typically views his or her alternatives as a broad range of possible responses often varying greatly in probable effectiveness.<sup>35</sup> Among these responses, the individual will usually consider procedures and remedies in both the civil and the criminal systems. Through his or her perception of the event and response to it, the participant thus makes decisions that affect both the civil and the criminal systems.

The occurrence of a primary event triggers a sequence of mental processes, some unconscious and others deliberate, that we can reify for purposes of discussion as a series of steps. First is cognition: learning the facts, perceiving, labeling, and reconstructing them. Then (or simultaneously) the perceived situation is normatively defined as expected or unexpected, satisfactory or unsatisfactory, offensive or pleasing. If the event is perceived in negative terms, the individual may seek the cause: Was it fate? Was it the result of his own actions or omissions or those of another? Particularly if the cause is seen to lie outside himself, he may consider whether the event is remediable or not. If remediable, the individual may begin to weigh the advantages and disadvantages of pursuing various remedies. Among the disadvantages, for example, may be such immediate costs as the time, worry, energy, and money required. In the longer run, there may be such disadvan-

35. This discussion of responses to legal events is meant to include corporate, collective, and institutional actors as well as individuals. A large proportion of social activity is in fact carried on by organizations, and organizations are frequently considered "legal entities" and appear as parties in civil litigation. In discussing the decision to respond to legal events, however, it must be remembered that decisions are framed and made by individuals whether the entity involved is an individual or an organization.



tages as the possible disruption of important relationships, threat of retaliation, or damage to one's self-image or reputation. Some official consequences of pursuing remedies may also be counted as disadvantages, such as the possibility of job blacklisting or increases in insurance rates. On the other hand, the pursuit of remedies may offer a number of advantages, such as the probability of being made whole, boosting one's self-esteem by taking effective action, and ordering relationships in a more favorable way (as in commercial relationships, domestic relationships, or even relationships with vandals or other persons who plague the individual with repeated injuries and aggression).

As the individual moves closer to a specific response decision, he becomes more sharply aware of the available options and the necessity of electing one to the practical exclusion of others. Frequently he is faced with a choice between civil and criminal alternatives, although the distinction may not be apparent to him at this point. An alternative, before it can be selected, must be known to the individual. In some settings, the police may be a more familiar and visible resource than are psychologists, social workers, arbitrators, or lawyers. The knowledge of available alternatives thus begins to mesh with the subjective mental processes we have just described; and particular events become associated with potential civil or criminal responses according to the nature of the event, the advantages and disadvantages of pursuing various remedies, and the knowledge of what resources are available. "Going to the law" may occur at any point, but typically, it comes relatively late in this process unless mandated at some earlier point, as in divorces or probate proceedings. Cultural factors may influence individual subjective processes in this regard, either discouraging resort to legal remedies as an extreme and socially destructive response or, on the other hand, encouraging the pursuit of such remedies as healthy, productive, and socially beneficial. Culturally, too, the use of either civil or criminal alternatives may be particularly favored or disfavored, and individual perceptions and responses may be shaped accordingly.

To summarize, events in real life do not usually bear labels marking them for civil or criminal processing. Rather, they tend to gravitate toward one system or the other as the result of a complex series of mental perceptions and calculations influenced by (and influencing) the range of legal and nonlegal resources known to be available in a particular locality. A factor of some importance in this process is the public image of the different resources—both criminal and civil—and public awareness of how such resources handle particular types of legal matters. This factor may lead individuals to take matters that appear to be predominantly criminal in character to a civil forum or matters predomi-

nantly civil to the police or public prosecutor. Where neither alternative is seen as favorable, the individual may seek less formal or legalistic alternatives or may decide upon self-help or inaction. Thus the particular civil and criminal resources and organizational styles in each community tend to interact with one another and with the subjective mental processes of aggrieved individuals. From this interaction there emerges a pattern of perceptions and responses to legal events that determines which resources are used on which occasions and how such resources respond to the legal matters brought to them. In this way, the particular response decisions of individuals involved in legal events determine the nature of the cases that enter the civil and the criminal systems for processing.

### *3. The Interaction of Civil and Criminal Case Processing: Pre-Judicial*

Once a case has actually been taken to an agency capable of pursuing litigation, it might be thought that the interplay between the civil and the criminal processes and alternatives would become less significant. In our view, however, this is simply not so. During pre-judicial processing of civil cases (stage 3) there are numerous linkages and interactions with the criminal system, some of which can prove to be of major importance for both systems.

At the most obvious level, it is quite common during the third stage to find explicit referrals between the civil and the criminal systems. Individuals may be advised by the police, the prosecutor, or even the judge to see their lawyer about a potential civil suit. This typically occurs when a case is rejected or dropped from the criminal system, but in some instances, particularly in complex business-related cases, a civil remedy is appropriate in addition to the criminal proceedings. Similarly, clients in civil cases are frequently advised by private lawyers to invoke the criminal process either to enforce public norms or to assert private rights more effectively. One striking illustration of this phenomenon is the mass collection of bad checks through criminal proceedings. Criminal complaints can be used in many situations to gain negotiating leverage over "civil" adversaries. Similarly, contact with lawyers and others in the process of pursuing a civil case may, by heightening the plaintiff's indignation or by uncovering sufficient new information, cause the plaintiff to initiate a criminal complaint.

There are also more diffuse systemic interactions between the pre-judicial civil and criminal processes. Both civil and criminal cases, as we have seen, are frequently resolved by means of negotiation. The anticipation of lengthy delays before a full judicial hearing can be held tends to affect negotiations in both civil and criminal cases. Such delays

may work either to provide more time for the parties to resolve their differences or to allow one side to obtain a more favorable settlement simply by outwaiting the adversary. Since civil and criminal cases are usually processed through the same courts, an unusually high number of civil or criminal trials or judicial hearings of any type will increase waiting times and consequently will tend to affect negotiating activities for both types of cases. A crackdown on organized crime, the enactment of "speedy trial" time requirements for criminal prosecutions, or a sudden increase in preliminary motions resulting from a new Supreme Court decision on the rights of criminal defendants, for instance, can all produce delay in the civil dockets and influence settlement negotiations in civil cases. Conversely, a recession leading to increased numbers of insolvencies, credit defaults, evictions, and foreclosures, or a related group of unusually complex and time-consuming civil cases might lead to more plea-bargained criminal dispositions because of greater judicial backlogs and delays. Even where "speedy trial" requirements for criminal cases have been mandated, they are often sufficiently ambiguous and provide enough exceptions<sup>36</sup> that the criminal docket may remain at least partially subject to such pressures from an overcrowded civil docket.

Another type of system interaction involves victim-plaintiffs' assessments of the pre-judicial process most appropriate to their particular situations. When criminal diversion mechanisms are fully elaborated and well funded, cases that would otherwise take a civil (or nonlegal) route may be channeled there. Examples of such diversion mechanisms are the informal intervention of prosecutors to arrange for the payment of debts, the provision of counseling for those involved in marital, family, or neighborhood disruptions, and the routine police handling of public drunkenness, vagrancy, and disorderly conduct. Similarly, when civil processes are working smoothly and are well publicized, as in small claims courts and other courts geared to the pro se plaintiff, many cases that would otherwise be handled by means of criminal complaint or quasi-criminal administrative processes may be processed through the civil system.

It is generally recognized that the filing of a well-publicized case may increase the filing of substantively similar suits. This is true, of course, for both civil and criminal cases. But in some situations a well-publicized civil case will actually increase the initiation of criminal suits, and the reverse may also be true. This occurs when there is a common factual nexus; for example, a criminal antitrust or securities prosecution

36. See Raymond T. Nimmer, *The Nature of System Change: Reform Impact in the Criminal Courts*, ch. 7 (Chicago: American Bar Foundation, 1978); Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667 (1976).

may bring in its wake a multitude of private civil lawsuits growing out of the same or similar dealings with the same or similar defendants. On the other hand, certain well-publicized cases may simply heighten general awareness of new areas of legal rights or new areas receiving more intensive judicial scrutiny, and such heightened awareness may lead to a profusion of both civil and criminal cases. This has undoubtedly occurred in such areas as environmental protection, individual rights, health and safety regulations, and certain areas of "consumerism," such as the regulation of credit and sales practices. These interactive effects result from publicity associated with the initiation of lawsuits. Publicity surrounding trials and outcomes of cases (stage 4) may, of course, have an even greater impact and, should the defendant win, may produce consequences that are the reverse of those we have described.

As we have shown, the criminal and civil systems interpenetrate and influence each other at many points in the pre-judicial process. This interplay and complementarity is not limited to the threshold decision of characterizing and responding to primary events but continues at various stages after legal events have become legal cases in either the civil or the criminal system. As we shall see, this interaction continues after pre-judicial processing as well in the stage of trial and disposition itself.

#### *4. The Interaction of Civil and Criminal Case Processing: Judicial*

In the fourth stage (judicial processing), the civil and criminal systems continue to interact in ways that shape strategies and outcomes in both systems. It is rather widely recognized, for example, that the facts found or the judgment reached in a case within one system may have a significant impact on a related case within the other system. Thus a criminal conviction or even an arrest may be a critical piece of evidence establishing liability for damages in a related civil tort suit. On the other hand, the outcome of civil litigation over matters such as title to property or child custody may be critical to the determination of guilt or innocence in criminal prosecutions for theft or kidnapping. In fact, sometimes the major significance to the parties lies not in the disposition of the primary suit but in its impact upon some secondary proceeding in the other system. Thus, for example, the significance for a nonresident alien of a criminal trial on a minor misdemeanor charge is not so much the fine that may be levied as the impact on future consideration of visa applications—a form of civil processing. Similarly, the primary significance of a conviction in a trial for a minor traffic offense may lie in the anticipation of a civil proceeding to revoke one's driver's license or in the cancellation of insurance.

Another form of civil-criminal interaction in this stage is the transfer, or possible transfer, of important evidence from one system to the other. It is not uncommon, for example, for a party in a civil lawsuit to learn about and use evidence uncovered in the investigation and prosecution of a criminal case. Similarly, the prosecution or the defense in a criminal trial may use evidence derived from civil litigation. Complex civil business litigation, for example, may disclose information leading to criminal prosecutions of business entities for antitrust violations or of individuals for fraud. Such matters may prove far more important than the amount of damages that might result from the civil suit itself.

Yet another form of civil-criminal interaction involves pretrial publicity and prejudice. When civil and criminal proceedings deal with the same persons or events, publicity generated in connection with one of the proceedings can have a prejudicial impact on jurors or potential jurors in the other. In the extreme case, a well-publicized civil trial might make it all but impossible to try a related criminal action, and the reverse may also occur.

In short, it is clear that the interaction between the civil and the criminal systems continues into the stage of judicial processing. The possibility of such interaction may be viewed by the parties, with some justification, as extremely important in determining strategies, in promoting or discouraging settlements, or in instituting new proceedings in one system or the other. Thus the interaction of the two systems, or the realization or fear that one of these forms of interaction might occur, can be a potent factor in the formulation and the disposition of civil cases. In this sense, the interplay between civil and criminal elements in this fourth stage is of some significance in shaping outcomes and explaining the behavior of judges, lawyers, and litigants in both civil and criminal cases.

##### *5. The Aftermath of Civil and Criminal Case Processing*

In our discussion of civil and criminal interaction in the fourth stage, we have already noted several ways in which judgments in one system could have important consequences—both formal and informal—in the other system. Numerous other examples could be cited to illustrate the interaction of the civil and criminal systems in the implementation and consequences of litigation (stage 5). A criminal conviction, for instance, may be grounds for divorce proceedings in the civil system. Similarly, the complaining witness in a criminal case may have a special interest in seeing the accused convicted in order to use the conviction as a basis for claiming civil-type compensation from insurance companies, victim-compensation commissions, client security funds (in cases of lawyer

fraud), and the like. This also occurs when an employer prosecutes an employee for theft or embezzlement in connection with his dismissal. In such cases the criminal conviction is treated by the employer almost like a declaratory judgment—to clarify rights and deter future conduct in matters usually thought of as civil in character, such as termination of employment or rights to pensions and other benefits. Civil court judgments may also play a crucial role in formal criminal proceedings, by defining, for example, rights of ownership relevant to criminal prosecutions for theft or conversion or by ruling on contract or lease rights relevant to prosecutions for trespass or property damage.

Thus in the fifth stage we see a continuation of the interplay between dispositions in one system and important consequences in the other. It is also noteworthy that the implementation of judgments in legal cases tends to blur the boundaries between the civil and the criminal systems. For example, in both the civil and the criminal systems jailing for contempt is an enforcement device commonly used to coerce monetary payments. In collecting civil judgments, plaintiffs often employ enforcement techniques and resources familiar in the criminal justice system. The sheriff, for example, is the legal authority called upon to levy and execute on property to collect a civil judgment. It is the sheriff who arrests the party who fails to appear for supplementary collection procedures. And persons held in civil contempt may eventually be imprisoned.

These examples merely return us to our original proposition that the civil and criminal features of cases are in fact inseparable and often indistinguishable aspects of a single reality—the legal system as it actually functions in society. A civil judgment is given teeth by the possibility of enforcement procedures of the criminal type, and a criminal disposition is often of value to the victim because it may lead to restitution procedures of the civil type or because it may exclude the convicted criminal *de facto* or *de jure* from further activities or relationships of the kind that caused the injury.<sup>37</sup>

In section A we focused primarily upon the civil system and attempted to show that the processing of civil cases possesses many of the systemic regularities typically ascribed to the criminal justice system alone. In section B, we have been more concerned to show that law in our society is not neatly compartmentalized into discrete categories grouped under the general headings of civil and criminal but that the two pervasive systems of processing legal cases are in fact inextricably linked and bound together in each of their five system stages. In the

37. Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 A.B.F. Res. J. 917.

next section of this paper we shall explore in more general terms the significance of this model of the civil justice system and its implications for those who seek to reform it.

## II. CIVIL CASE PROCESSING AND THE IMPLEMENTATION OF LEGAL NORMS IN SOCIETY: TWO PARADIGMS OF JUSTICE

If our purpose is to dissipate some of the confusion now surrounding the civil justice system and the numerous proposals for its reform, then we must not confine our analysis to that system's linkages to the criminal system but must look beyond to its broader societal context. The approach in this section, however, will be limited. We are not undertaking a general social theory of law. Rather, we intend to describe how, in the particular model of the civil justice system which we have presented, legal norms in society are implemented and how particular kinds of changes within the civil system might affect this important function.

Our model of the system of civil case processing in society consists of five interrelated stages, each of which features significant criminal aspects or interconnections. These five stages are, in turn, made up of myriad institutions and processes, some of which we have already discussed. The principal components of the civil justice system operate in a kind of equilibrium—a dynamic balance of forces—which is itself the product of external as well as internal pressures, interrelationships, and feedback loops. To conceive of this system in terms of an equilibrium that has developed over time out of particular social conditions is to suggest that other patterns may evolve in different social settings where other cultural, political, economic, and legal factors obtain. Thus the manner in which our five-stage model functions in a particular social environment is highly variable and is dependent upon a number of factors extrinsic to the system as well as upon its own intrinsic structures and processes.

The study of law and legal institutions in other cultures has demonstrated the various forms that legal systems have assumed in social environments different from our own.<sup>38</sup> Indeed, one of the recurrent motifs in much of the reform literature is the desirability of transplanting in our own civil system some of the most admired attributes of foreign systems, such as the conciliation procedures prevalent in Japan or the highly personalized and nontechnical neighborhood

38. This is a principal theme of David M. Engel, *Code and Custom in a Thai Provincial Court: The Interaction of Formal and Informal Systems of Justice* (Tucson: University of Arizona Press, 1978).

moots found in tribal societies and some socialist states.<sup>39</sup> Such reforms, however, become highly problematic if designed and implemented without attention to our legal system as an interrelated whole and to its distinctive patterns of interaction with the social environment. A particular desired state of affairs cannot be created simply by selecting attractive procedures or structures from other settings or from one's own imagination with the expectation that they will function automatically in the desired manner. If one attempts to modify the civil system by imposing an alien institution while failing to take account of the complexity of existing forces, the result is likely to be a distortion of the injected institution as well as a complex series of unintended effects in other parts of the system. Ill-considered reforms can produce unanticipated changes in the equilibrium within which each component process and institution operates. It is therefore necessary to give some careful attention to how the civil system functions in its broader societal context.

Within the Anglo-American legal tradition, conventional views of the interrelationships between legal system and social environment have been dominated by a highly idealized conception of common law litigation. According to this traditional conception, the processing of individual cases based primarily on statutes and precedents derived from other cases automatically generates norms of general application and inculcates them throughout society. This concept of the common law resembles in many ways a traditional view of the free market economy, which is premised on the assumption that an "invisible hand" automatically transforms the atomistic, self-centered, "rational" economic decisions of business competitors and consumers into optimal resource allocations and social arrangements ultimately to the economic benefit of all. Adherents to the traditional concept of the common law assume that a comparable invisible force operates on individual judicial decisions to form them into the great body of common law precedents that optimally define and enforce norms of justice and order for the social collectivity.

While this idealized view now strikes many as overly simple and naive, its conception of the role of the legal system—and in particular the civil justice system—remains highly relevant to current considerations and debate. On the one hand, a legal system must provide some

39. See, e.g., Warren E. Burger, *Agenda for 2000 A.D.—a Need for Systematic Anticipation*, 70 F.R.D. 83, 94 (address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Apr. 7-9, 1976); Daniel McGillis & Joan Mullen, *Neighborhood Justice Centers: An Analysis of Potential Models* (Washington, D.C.: Department of Justice, Law Enforcement Assistance Administration, 1977).



routinely available mechanism to process legal matters when they arise so that particular problems can remain localized and social life can go on. On the other hand, a legal system must also generate, promulgate, and inculcate the norms of social conduct and justice which regulate behavior, specify the normative framework within which particular cases can be resolved or terminated, and create some measure of order and justice. This organic process often operates by means of the representative or exemplary case, which, whether within the immediate locality or on a broader scale, has significance for persons beyond the actual participants. Cases such as these capture normative issues of general application in a form that can be processed and adjudicated. The case as argued and decided can also serve as a symbol in the popular mind for the normative conflict and its resolution, as for instance happens when leading Supreme Court cases and decisions receive extensive press coverage and are the subject of public discussion. Through these organic and holistic processes, norms are generated, proclaimed, and disseminated throughout society. Llewellyn and Hoebel make a similar point:

Law has as one of its main purposes to make men go round in more or less clear ways . . . .

But there is more to law than intended and largely effective regulation and prevention. Law has the peculiar job of cleaning up social messes when they have been made. Law thus exists also for the event of breach of law and has a major portion of its essence in the doing of something about such a breach.<sup>40</sup>

Thus, a legal system serves two major functions: a generalized normative ordering and the resolution of particular cases.<sup>41</sup> The current era has witnessed a weakening of faith that the traditional common law system can do both of these "law jobs" effectively at the same time. The two functions have tended to become distinct from one another in the popular and professional minds and have led to two rather different paradigmatic views of the civil justice system. In the remainder of this section we shall discuss and analyze these two paradigms of law and justice. Each is useful in focusing attention on important aspects of certain cases, and each provides a total view of the civil justice system and society strikingly different from the other. Neither paradigm, of course, should be emphasized to the exclusion of the other, since each highlights a process fundamental to any society. While we shall discuss

40. Karl Llewellyn & E. Adamson Hoebel, *The Cheyenne Way* 20 (Norman: University of Oklahoma Press, 1941).

41. For one systematic conception of the relationship between these two functions and the institutions that serve them, see Steele, *supra* note 32, at 1111-17.

the two paradigms in highly simplified and idealized terms, they are abstractions derived from the immediate and tangible realities of the legal system in operation. It is quite clear that most modern observers of the civil justice system have tended implicitly to adopt or emphasize one or the other of these two perspectives and to formulate their conclusions on the basis of assumptions underlying the particular paradigm adopted. Let us, then, begin our analysis of these two paradigms by briefly summarizing their essential characteristics.

The first paradigm construes justice in civil cases as a particularistic matter. It suggests that justice is best maintained by ensuring that due process is guaranteed to the fullest extent in each case, that each case obtains meticulously equal treatment, and that universally applicable rules and procedures prevail for all cases and all parties without distinction. If such an ideal could be fully realized, then under this paradigm law and justice would be distributed widely and without discrimination. Not only would this state of affairs secure the maximum protection of individual interests in each instance, but it would also benefit society as a whole by ensuring that our social values, goals, and aspirations, expressed in the form of laws, would be disseminated as broadly and effectively as possible.

The second paradigm construes justice in civil cases as an illustrative and exemplary matter. It suggests that the rules and principles that should guide social interaction are best articulated in a small number of carefully selected and highly visible cases. Such cases should be processed with the full panoply of formal and elaborate legal procedures and protections. The results of these cases in turn should determine the outcomes of vast numbers of less prominent cases and, indeed, should shape social relationships and behavior in such a way that cases of a similar kind would no longer develop into contested matters. For the more numerous and less visible civil cases, however, there should be no need, under this paradigm, to apply the complicated and protracted adjudicatory procedures that are used for the representative or norm-producing cases. To do so would be wasteful, expensive, time-consuming, and counterproductive for the parties involved as well as for the formal judicial apparatus. Furthermore, social harmony would be seriously disrupted if conflict and contentiousness were spawned by widespread adversarial proceedings involving large numbers of persons and cases. According to this view, the real purpose of the justice system is to diminish rather than to aggravate conflict by refining and articulating in specific cases norms and values that are then implemented in society through nonjudicial means. Thus, for all but the exemplary cases, the ideal way to handle conflict in society is to resolve it through

inexpensive, personalized, and conciliatory procedures in which recognized legal norms are invoked and applied.

These two paradigms are, in effect, two views of society—one mechanistic and the other organic—each with deep jurisprudential and sociological roots.<sup>42</sup> They are, we would suggest, fundamentally irreconcilable yet interrelated in the sense that they constitute polar opposites for our compasses of legal change. Although we present them here in highly simplified and idealized terms, they manifest themselves time and again in one guise or another in the form of alternatives between which one must choose when seeking to advance the cause of justice in society. Needless to say, each of these paradigms has strikingly different implications for the system of civil case processing which we have attempted to delineate. Let us briefly consider some of these implications for our five-stage model.

42. Since our use of the terms “mechanistic” and “organic” may call to mind Emile Durkheim’s classic discussion of “mechanical” and “organic” social solidarity in *The Division of Labor in Society*, trans. George Simpson (New York: Free Press, 1933), some of the similarities and differences between his usage and ours should be noted. Durkheim emphasized the centrality of the legal system both in expressing cultural norms and in re-creating and reinforcing the normative cohesiveness and morale of society through the invocation of legal norms in action. To the extent that any modern study explores the interrelationships among legal processes and social ordering, a substantial debt to Durkheim must be acknowledged. Despite this fact, however, and despite the similarities between our terminology and his, our definitions and models differ substantially. While influenced by his central conception, we do not wish to incorporate by reference Durkheim’s theoretical scheme. Durkheim linked his “mechanical” and “organic” paradigms explicitly to the degree and nature of social development. Mechanical solidarity, associated with repressive, penal-type sanctions, typified, for Durkheim, less complex societies, while organic solidarity, associated with restitutive sanctions, typified more complex and highly differentiated societies. We assume no such developmental linkages and view neither of our paradigms as having a particular association with either repressive or restitutive sanctions. Rather, in applying our “mechanistic” and “organic” paradigms to the civil justice system, we assume that both are always present or possible and merely become more or less prominent or highly valued in differing times and situations.

Further, we view our mechanistic and organic paradigms as related to sources other than Durkheim which are equally relevant. There are, for example, “organic” aspects to the natural law assumption that legal norms are immanent in social actors or in human society rather than propounded *de novo* by courts or legislative organs. While courts may clarify and effectuate such norms in certain cases, according to this view, the essence of the legal process is the natural harmony and cohesion that results from legal tribunals articulating laws that were, in a sense, “already there” in the social collectivity.

Similarly, we may perceive certain “mechanistic” elements in the positivist assumption that the essence of law is prior command and that legal norms should be enunciated in advance and implemented in case after case by governmental tribunals. Through the courts’ repeatedly applying such rules to social actors, legal norms could be disseminated throughout society, and social behavior could be shaped in a rational manner.

Numerous other manifestations of the organic and mechanistic paradigms could be cited in works deriving from the historical, anthropological, and sociological schools of jurisprudence (which occasionally reflect an organic perspective) or in works of the American realists (whose perspective is more typically mechanistic). None of these jurisprudential schools adopts either perspective to the exclusion of the other, but they have each refined and revised the two paradigms in distinctive ways and lent their weight to the impact of these perspectives upon prevailing views of legal processes and the civil justice system.

The *mechanistic paradigm* is based on a Hobbesian vision of society as a set of atomistic units—both individuals and aggregates—interacting with one another and coming into frequent conflict. Legal events or conflicts (stage 1) involving such units are therefore appropriately handled in a particularistic manner at the least cost to society in order to preserve peace and order, defined in terms of frictionless interaction among the units. In this view, the response decision (stage 2) is primarily an economic or strategic one in which parties rationally balance the risks and rewards of available options. The decision to litigate or to select any other available legal or nonlegal option is made when it appears, from limited information, to offer the most cost-efficient way to handle the matter. The pre-judicial processing of cases (stage 3) consists, first, of a verification that litigation is indeed the most cost-effective or efficient mechanism for handling the particular legal matter (with a referral or diversion if some more efficient mechanism is found) and, second, of an attempt to resolve the matter directly by mediation or negotiation to ensure that the matter to be litigated is in fact an irreconcilable case or controversy not amenable to less formalized dispositional alternatives. Within the mechanistic paradigm, fairly high barriers to formal adjudication in terms of costs, time, and other factors may be defended as ways of shifting the cost-benefit equation toward nonjudicial resolutions for legal matters in which judicial processing is not really required.

Judicial processing (stage 4) likewise strives toward the most expeditious handling of cases. Familiar judicial doctrines of restraint and efficiency fall in line with this paradigm. Efficient adjudication, in this view, would deal only with the explicit issues involving the immediate parties and would delve into them only as far as necessary to make a just resolution. Any notion of resolving deeper underlying and more widely shared conflicts or issues would, in this view, be less appropriate than the restrained application of due process to bring about a just termination of the immediate case. The implementation and consequences of judicial processing (stage 5) are viewed then principally in terms of their effect on the individual interests of the conflicting parties. Specific enforcement or collection procedures are the main focus of consideration. The implications of a decision for other legal matters involving other parties lie mainly in its precedential value, that is, its usefulness in predicting judicial decisions in future cases.<sup>43</sup> It is this view of legal

43. This line of thought may be illustrated by Holmes's theory of law as seen from the perspective of the "bad man," who guides his behavior solely by his estimate of the outcome of possible litigation. See Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). Also pertinent are the writings of the group Jerome Frank termed "rule skeptics." These individuals argued that lawyers

process that leads most bureaucratic bodies handling civil cases to assume that if the complainant does not contact them further after the decision, then the matter has been essentially resolved. The mechanistic paradigm as a whole views the civil legal process as a great machine whose inputs are parties pressing legal interests in specific cases and whose outputs are parties no longer pressing such interests.

The *organic paradigm*, unlike the mechanistic, views society in terms of abstract norms and values that guide purposive individuals<sup>44</sup> as distinguished from the image of atomistic individuals pursuing more limited and situationally defined goals. Thus, legal problems or events (stage 1) are viewed as conflicts of value as well as conflicts of interest,<sup>45</sup> which are interpreted and given meaning by the participants in terms of larger social relationships, norms, and values. The response decision (stage 2) is not purely a mechanical cost-benefit equation but includes more subjective elements of sentiment and value as well as shared culture and norms. According to this organic paradigm, the decision to litigate is reached because there is a conflict of value that needs to be resolved or a gap in the seamless web of principle or interpretation where a norm needs to be clarified and stated. Thus the decision to litigate is a recognition that there is no appropriate norm covering the conflict situation.

Pre-judicial processing (stage 3), in this organic paradigm, consists first of the reassessment of the parties' decision that there is indeed no existing norm applicable to the situation. Presumably, if pre-judicial processing disclosed an appropriate norm, the legal matter would not require further court processing but would be settled by consensual processes. Assuming no norm is found, the pre-judicial processing would take the form of assuring that the case was properly prepared for adjudication. This would include the assurance of adequate representation for all parties and all interests and perhaps the encouragement of formal participation by unrepresented interests, such as by *amicus curiae* intervention. Pre-judicial conferences, discovery proceedings, and the like would also ensure that the full scope and implications of the facts became known and therefore that the full range of legal issues,

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would better serve society—as well as their clients—if, before filing a lawsuit, they could anticipate more accurately the ultimate outcome. Accordingly, they sought to improve the art of predicting judicial decisions based on past dispositional patterns. Generally speaking, they tended to concentrate their efforts on the activities of the appellate courts. See Frank, *supra* note 10, at 74-75; Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co., 1960).

44. See Durkheim, *supra* note 42; Erikson, *supra* note 12, at 1-31.

45. Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 J. Conflict Resolution 26 (1963).

societal interests, and particularistic and general evidence relevant to the rule-making decision would in fact be placed before the court.<sup>46</sup>

Judicial processing (stage 4) takes the form, then, of a careful review and assessment of arguments and interests before the court to arrive at a new norm of general application. Ideally, from this point of view, all concerned strive for a full and exemplary consideration of the issues in the case rather than for an efficient resolution of the particular legal matter narrowly defined. The issues and values involved would take precedence over the particular interests of the litigants, and the result of the case would be seen as a norm intended to govern all similar situations in the future. The implementation of a judicial decision (stage 5) would, under the organic paradigm, commonly include in appropriate cases the full range of appeals in order to refine and articulate the issues more fully and forcefully. Once the highest level of appeal had been completed, the implementation of such new norms would also involve their dissemination throughout the legal enforcement system (e.g., among administrative and executive departments, lower court judges, and members of the bar) and among the general population. The consequence of a judicial decision, in the organic view of the legal system, would not be simply to reorder an individual conflict so that it would no longer be pursued but to lay down rules to govern social intercourse in the future and bind the society together. In this view, legal decisions are important for their socializing and educative effect<sup>47</sup> as well as for their direct impact on the case at hand.

The two paradigms may be contrasted further by considering their differing views of the systemic consequences of landmark cases handed down by prestigious tribunals. Under the mechanistic paradigm, the landmark decision is one that, by narrowly construing rights in a highly significant case, redefines the rules to be applied in the lower courts. The expected result is a flood of similar cases filed in the trial courts in order to implement the rules specified in the landmark decision. One would expect that, when similar cases arose in the future, a great many of them would be litigated (stage 4) in order to take advantage of the new rules, although few would presumably be appealed unless further

46. Conceived and implemented in this way, judicial decision making begins to take on some of the aspects of the legislative process. Nevertheless, important distinctions between adjudication and legislation remain. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353 (1978).

47. This function of the legal system is explored in, for example, Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974); June Louin Tapp & Felice J. Levine, eds., *Law, Justice and the Individual in Society: Psychological and Legal Issues* (New York: Holt, Rinehart & Winston, 1977), especially pt. II; June Louin Tapp & Felice J. Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 *Stan. L. Rev.* 1 (1974).

rule refinement were needed. Under the organic paradigm, on the other hand, the landmark case is viewed as one that states important norms of general applicability that would have the effect of legitimizing new rights and helping change behavior through its educative, socializing, or symbolic effect. The expected result of the landmark case, under this view, would be some degree of compliance, a possible reordering of social relationships, and a vastly changed framework for negotiations (in stages 2 and 3), but very few follow-up lawsuits except those brought to clarify subtleties of application or apparent loopholes. Of these, a relatively high proportion would be appealed. Under this paradigm, one would typically take advantage of the new rule by means other than judicial processing, for the landmark decision would make further litigation for the most part unnecessary.

Clearly the mechanistic and organic paradigms are "ideal types," in the sense that Weber used the term.<sup>48</sup> Neither paradigm exists in pure form, but rather every functioning legal system exhibits alternating or contradictory tendencies toward one or the other from time to time. Together, these two different visions of law in society help to shape the particular balance of social conditions and legal structures—the civil justice system—of a particular locale. Neither paradigm is inherently right or wrong, but rather they should both be viewed as analytic tools, used by observers to understand the processes and problems of the civil justice system.

With these two paradigms of justice in mind, we can better understand many of the criticisms of our civil justice system and the modifications that have been proposed. One line of reform, strongly influenced by the mechanistic view of the civil system, has sought to expand the sphere of adjudication (stage 4) and, to the extent possible, ensure that every meritorious civil case is fully and fairly tried before a judge. The catch phrase is thus accessibility: "everyone deserves his day in court." Specific suggestions to implement this basic reform strategy have been aimed at streamlining and making less costly stage 3 and stage 4 processes through, for example, the *in forma pauperis* petition; the lowering of filing fees, bonds, and service fees; the simplification of service of process and pleadings; the use of specially trained court clerks and even law student interns to aid the *pro se* litigant; the appointment of more judges; the addition of evening court hours; the establishment of decentralized courthouses; the elimination of contin-

48. The term "ideal type" is not meant to carry any positive or negative connotation but is used here in the Weberian sense. An ideal type is a "mental construct" abstracted from observable social reality, which isolates certain essential features in order to apprehend and analyze complex social phenomena more effectively. See Max Rheinstein, *Introduction to Max Weber, Law in Economy and Society* xxix-xxx (1954).

uances; the barring of appeals; the barring of attorneys; the elimination or drastic modification of the rules of evidence; the elimination of juries; and so forth. All these strategies have been suggested to eliminate obstacles that prevent many civil cases from being adjudicated, to shift the strategic balance toward rather than away from full judicial processing. The assumption is that all nonfrivolous civil cases should be tried to ensure just outcomes, that the judicial trial is the most nearly perfect method of obtaining justice that we have been able to devise and should be used as frequently as possible to assure the maximum amount of justice in society.

Such reform proposals, of course, must inevitably face questions about the availability of resources—judges, courts, and lawyers. To expand the sphere of adjudication significantly, such resources would either have to be diverted away from other areas of the legal system—probably the criminal justice system—or be found externally. Further, if lawyers were to be used in the trial of more civil cases, they would either have to work for far lower fees than they do at present (a move they would certainly oppose) or would require significant subsidies, supported presumably by large tax levies, since the bulk of civil cases not presently adjudicated do not economically justify the cost of full legal representation. If subsidization were not provided, major revision of the process of adjudication itself would appear to be necessary either to allow lawyers to try cases so quickly and with so little preparation that they could charge only nominal fees or else to allow effective *pro se* adjudication in many cases. The former type of revision, however, in seeking to achieve more efficient trials, would inevitably whittle away at many of the procedural due process protections that have evolved over the centuries. The latter sorts of revision would of necessity transform the role of judge from that of a neutral, distant umpire to that of an active, involved inquisitor, investigator, framer of issues and arguments, marshaler of evidence, and decision maker. While each of these revisions has at times been seriously advocated and attempted, it is important to note that they involve major alterations in the process of adjudication itself; and such alterations are inconsistent with the fundamental assumption underlying the mechanistic paradigm, that the implementation of justice in our society is best achieved through the meticulous application of traditional due process safeguards in the largest possible number of civil cases.<sup>49</sup>

49. The assumption behind such arguments is that cases that are not fully adjudicated are simply not processed in any significant way by the legal system and therefore do not obtain justice. Since only a small fraction of legal events ordinarily reach full adjudication (stage 4), this argument raises for us the question of whether dispositions at all other stages tend to be unfair—that is to say, whether the vast bulk of civil cases reach unjust outcomes. This question simply cannot



A second line of reform, which reflects the organic view of the civil justice system rather than the mechanistic, advocates the strengthening of various ongoing social processes so that judicial intervention would occur only on the relatively rare occasions when the applicable norms had not already been set forth. Typically, it is suggested that "petty," "small," or "minor" cases be channeled to other more efficient and appropriate forums so as not to clog the civil court dockets and squander scarce judicial time and energy on cases that present no issues of general social significance.<sup>50</sup> It is forcefully asserted that an explosion of civil litigation has occurred in this country and that this increased litigiousness is dangerous and detrimental to our society as well as wasteful of valuable social resources. Far from advocating an expansion of the sphere of adjudication, persons adopting this view of the civil system argue for nonjudicial procedures that could effectuate legal norms in society by conciliatory and nonadversarial means.<sup>51</sup>

The influence of the organic perspective has thus focused attention on stage 2 (response decision) and stage 3 (pre-judicial processing) and has caused them to be viewed as replete with alternatives to stage 4

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be answered with any assurance. While it is undoubtedly true that the cause of justice would be advanced by adjudication in many instances, we suspect that this is far from universally true, especially when the costs of adjudication in such cases are balanced against the sometimes incremental difference in benefits that could be obtained through adjudication. If it could be established that nonjudicial or extrajudicial dispositions did indeed lead to acceptable results in large numbers of cases, then the objective of reform should logically shift toward assuring the availability of a relatively noncostly "appeal" to the civil trial court whenever outcomes in early stages were believed unjust. Judicial supervision over the nonjudicial disposition of cases at earlier stages should, according to this approach, be strengthened and improved. This type of judicial supervision might resemble that imposed upon the earlier stages of criminal case processing by the Warren Court decisions in criminal rights cases involving the handling of suspects by police and prosecutors.

50. Critics, of course, argue forcefully that such suggestions promote "second-class justice" for the vast bulk of civil cases, a double standard of due process dependent on the amount at stake or the means of the parties. In effect, they pit the mechanistic paradigm against the organic in opposing the segregation of certain groups of civil cases from forums in which due process is strictly observed.

51. In considering this debate over the alleged double standard of due process, it might be useful to draw upon a distinction, familiar in other contexts, between equality and equal opportunity. In the areas of employment and education, for example, it is urged that while everyone is not equal and never will be, our values of equality are served by equal opportunity: the fair chance to achieve. Applied to the legal setting, this analogy might suggest that if nonadjudicatory procedures were to be made efficient and fair and if adjudication itself were somehow made available to all who wanted it, the fact that most cases never reach adjudication should not in itself be cause for alarm. That is, it may not be the fact of adjudication but the opportunity for adjudication—the full panoply of due process safeguards—which is important. The opportunity for adjudication means in effect that the case may go onto the next stage if the parties insist. If this opportunity were made real for all parties and all cases (a considerable and perhaps impossible task) and were generally known, it would require a significant degree of judicial supervision and control over the earlier nonjudicial processes, since the disposition at an earlier stage could always be overturned by an appeal to the civil trial court. The formulation of a supervisory or managerial role for a trial court judge would not, as we have seen, depart far from procedures that have already evolved on a de facto basis.

(judicial processing). It has emphasized that a variety of processes other than adjudication already operate in all societies—including our own—to dispose of most civil cases and that justice may be served by strengthening or even institutionalizing these processes. Specific reform strategies focusing on stage 2, for example, have included attempts to make citizens more aware of their substantive rights and legal remedies through high school courses, newspaper and magazine reporting, and consumer forums; various disclosure requirements; the provision of counseling, advice and lay-advocate services through existing social service agencies, mass media action lines, ombudsmen, trade organizations, and political and community leaders; and the establishment of routine, ongoing “informal” dispute-settlement mechanisms to implement consumer warranties and handle disputes arising thereunder.<sup>52</sup> Thus, through a variety of procedures, including counseling, mediation, negotiation, fact finding, conciliation, advice, “cooling out,” and even therapy, people with grievances would be encouraged to resolve them without recourse to courts or even lawyers. All of this, it is usually suggested, would be strictly consensual and noncoercive. Access to the legal system would not be affected by prior participation in these various mechanisms. Typically, such alternatives are viewed as appropriate only for particular kinds of civil cases—those involving individual litigants rather than corporate entities and those in which the amount at issue is small.<sup>53</sup>

Reformers influenced by the organic perspective have also sought to expand and enhance alternative resources available in stage 3—pre-judicial processing—once contact with the formal legal system has already taken place. Many have suggested that, regardless of whether a true case or controversy has actually been presented to the court, informal help should be made available (and/or compulsory) at this point—*after* filing the case—as a form of “civil diversion.”<sup>54</sup> Court-

52. See 15 U.S.C. § 2310 (1976) and regulations issued thereunder by the Federal Trade Commission, found at 16 C.F.R. §§ 703-703.8 (1978).

53. It is interesting to note, however, that when government-related organizations have attempted to create such institutions out of whole cloth, they have met with only limited success. Typically, when such a body is organized, few clients appear except those referred by local police, court clerks, or prosecutors' offices. See McGillis & Mullen, *supra* note 39. Thus, while these institutions should theoretically operate at stage 2 of the civil system (as an alternative to be explored before contact with the formal legal system), they have in actual practice been appended to the formal legal system, typically on the criminal justice side, as diversionary mechanisms at stage 3 (pre-judicial processing), after contact has already been made with the formal legal system. The ability of such government-created institutions to function effectively in other ways has not been consistently demonstrated.

54. See Earl Johnson, Jr., Valerie Kantor, & Elizabeth Schwartz, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases*, National Center for State Courts Publication no. R0023 (Denver: National Center for State Courts, 1977); U.S., Department of Justice, Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, *The New*

sponsored marriage counseling has, for example, become a common feature in the pre-judicial processing of divorce cases, and psychological and social services are often used in the pre-judicial processing of juvenile, family, and adoption cases. Similarly, mediation and conciliation by the judge or by other court or noncourt personnel are often proposed as part of the pre-judicial processing of most types of civil litigation, particularly in cases involving consumer credit, neighborhood, and housing disputes.

As this kind of reform is urged more and more strenuously, however, certain questions are inevitably raised. The formal implementation of alternative "informal" procedures requires that the state justify the diversion of some cases but not others to these alternative forums, particularly when it is suggested that the diversion be made compulsory. On what basis shall cases worthy of immediate judicial processing (stage 4) be discriminated from those that must first be mediated, counseled, and conciliated (processes associated with stages 2 and 3), especially in light of our heightened awareness that informal negotiation already plays a critical role in most cases under the system as it now operates, both before and during judicial processing? It is one thing to observe that many kinds of cases are processed without adjudication under the present system, however favorably or unfavorably we may view this fact. It is quite another for the government to attempt to legitimate and institutionalize disparate procedures for different types of cases or litigants and to become entangled in the kinds of invidious distinctions that inevitably result from such undertakings. Considerations of due process in particular cases thus tend to frustrate and confuse our impulses toward social harmony and cohesiveness in the aggregate and confound this kind of attempt to change the equilibrium now existing within the five-stage civil system.

This line of reform has also spawned proposals to use arbitration in various ways as an alternative to the judicial processing of civil cases. Arbitration is a statutory process that follows fixed procedural stan-

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Justice: Alternatives to Conventional Criminal Adjudication, prepared by David E. Aaronson *et al.* (Washington, D.C.: Government Printing Office, 1977). Such diversion of civil cases from the trial court under the organic paradigm may be contrasted with the diversion of cases under the mechanistic paradigm, discussed at p. 337 *supra*. Under the mechanistic paradigm the distinction between true cases and controversies and other kinds of legal matters is critical to the diversion decision. Only when a lawsuit presents a fundamentally irreconcilable legal dispute is judicial processing viewed as fully appropriate. In the case of the organic paradigm, however, the distinction is less important. Here, the dominant concern is to disseminate legal rules and norms as broadly and effectively throughout society as possible. While full judicial processing may occasionally serve that purpose, for the vast majority of legal matters it is more likely that informal and conciliatory procedures will do better, even when the legal matter presents a real case or controversy. Once the applicable norm has been articulated in an exemplary or illustrative case, the organic perspective views the value of litigation for all related legal matters as greatly diminished.

dards and provides for judicial supervision by means of explicit appeal to the courts (either to set aside or to enforce arbitration awards). Thus arbitration is a part of the formal legal system and an aspect of pre-judicial processing (stage 3) at whatever level it is initiated. Arbitration signifies the initiation of legal process and associated *res judicata*. There is no trial *de novo* after arbitration as there may be after intervention or decision of an informal institution at the second stage.<sup>55</sup>

Some commentators have gone further and suggested that the process of adjudication itself be made more like arbitration, mediation, and conciliation: more "informal," less "legalistic," simpler, less constrained by the law of evidence, and more free to decide cases on the basis of fairness rather than on the basis of law. Thus a fascination with the expansion of stage 2 and stage 3 alternatives to judicial processing (stage 4) has, in effect, generated yet another, and somewhat contradictory, impulse—to transform the fourth stage itself and recast trial and adjudication in the image of its less formal alternatives.

In this instance we can discern the organic and mechanistic paradigms in a radically different juxtaposition. An emphasis on organic unity and the harmonious implementation of legal norms has here led to the suggestion that we abandon our traditional highly articulated due process concept of adjudication, even in cases of great social importance. In this line of argument the mechanistic paradigm has been all but abandoned for the organic paradigm, leaving no place at all for the meticulous and technically complex adjudication of civil cases. We are left to wonder, however, whether this new form of "adjudication" is expected to be used more widely in larger numbers of cases, thereby achieving mechanistic ends (expanding the sphere of adjudication) through organic means (emphasizing simplified and conciliatory procedures rather than complex adversarial confrontations). Or would adjudication still be viewed as a rare and infrequent event, used primarily to articulate norms in highly visible and significant cases but arriving at those norms through procedures more suited to the conciliation of parties than to the clarification and redefinition of important disputed issues?

55. Arbitration can be a required procedure, for instance, among trade organizations, retail stores, community groups, and other organizations, or may be suggested in particular disputes on an *ad hoc* basis. Sometimes the arbitration of disputes arising under a particular contract may be stipulated within the contract itself. This commonly occurs, for example, in contracts for insurance, architectural services, and construction. Arbitration may also be used as a form of civil diversion after the filing of the case in court, either as a consensual alternative procedure (as in New York City Small Claims Court; see Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 L. & Soc'y Rev. 339 (1976)), or as a mandatory alternative process (as in Los Angeles personal injury cases with small damages and in Cleveland small civil cases; see California, Judicial Council of California, *A Study of the Role of Arbitration in the Judicial Process* [1972]).

Once the mechanistic and organic perspectives are distinguished and clearly formulated, it is easier to perceive the often contradictory implications of such proposed changes in the civil justice system and to anticipate the interactions likely to occur among the five stages of the civil system if such changes were implemented. Before the civil justice system can be changed for the better, then, we must obtain a firmer grasp on what the system is and how it actually functions in our society. The impulse to reform is not new, nor are concerns about the civil justice system unique to our times. These same issues have surfaced frequently throughout the modern era, from Roscoe Pound's analysis of "The Causes of Popular Dissatisfaction with the Administration of Justice"<sup>56</sup> in 1906 to current debate over congested courts and unmet legal needs, from the first advocacy of small claims courts in the late nineteenth century to the current expansion of civil diversion alternatives. And, as Pound in his historic address reminded us, "Dissatisfaction with the administration of justice is as old as law."<sup>57</sup>

The problem, we would suggest, is not merely one of finding the right answers but of asking the right questions. There has been a recurrent tendency to gloss over the "is" of the civil justice system and move too quickly to specific recommendations couched in terms of "ought." Without a clear perception of the structure and processes of the civil system and the interaction among its various components, the typical response to "popular dissatisfaction"—and to professional dissatisfaction as well—has been to propose yet another procedure, institution, or remedy to be added to the existing system like another accretion on a formlessly expanding coral reef.

Our overview of the processing and litigation of civil cases suggests that traditional conceptions may be increasingly inadequate, that disparate current notions of what civil justice is and how it is achieved may reflect deep schisms of which we are scarcely yet aware, and that some very hard and fundamental decisions lie not far ahead. It may be possible to postpone or ignore such decisions in the short run and continue tinkering with narrowly conceived ad hoc reform measures in response to the larger problems that face us. The wiser course, however, is to confront directly the basic realities of civil litigation and case processing in our legal and social system and to decide now how we shall set out to design legal institutions and processes that may move us closer to a truly just society.

56. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 273 (1964).

57. *Id.* at 273.